

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

<b>LAZ Parking LTD, LLC</b>	)	
	)	
<b>-vs-</b>	)	
	)	
<b>Commonwealth Edison Company</b>	)	<b>Docket No. 12-0324</b>
	)	
<b>Complaint pursuant to Sections 9-250 and</b>	)	
<b>10-108 of the Illinois Public Utilities Act</b>	)	
<b>and Section 200.170 of the Rules of</b>	)	
<b>Practice of the Illinois Commerce</b>	)	
<b>Commission.</b>	)	

**DRAFT POSITION STATEMENT**  
**SUBMITTED BY COMMONWEALTH EDISON COMPANY**

**Dated: May 20, 2016**

## TABLE OF CONTENTS

I.	INTRODUCTION .....	3
II.	UNDISPUTED FACTUAL BACKGROUND .....	5
III.	APPLICABILITY OF SECTION 410.200 .....	8
A.	The Regulatory Framework .....	8
1.	Part 410 .....	9
a)	Meter Error .....	9
b)	Pre-Installation Testing .....	9
c)	Post-Installation Inspection .....	10
d)	Part 410 Contemplates that Some Errors Will Still Occur ...	11
2.	Part 280 .....	13
B.	The Error in this Case .....	15
1.	There Was No Meter or Associated Equipment Error .....	15
2.	The Error Was a Billing Error .....	16
IV.	SECTION 410.200 TESTING AND ACCURACY REQUIREMENTS .....	17
A.	The Requisite Pre-Installation Tests .....	17
B.	The Requisite Post-Installation Inspection .....	18
1.	Burden of Proof .....	19
2.	The Additional Testing that LAZ Recommends .....	19
a)	The Commission Regulations Require a Post-Installation Inspection, Not a Post-Installation Test .....	20
b)	The Testing that LAZ Recommends Does Not Meet the Part 410 Accuracy Requirements .....	23
c)	The Testing that LAZ Recommends Would Not Reveal the Use of the Incorrect Constant .....	24
3.	LAZ Attempts to Institute a Rulemaking under the Guise of a Contested Case .....	25
V.	FACTUAL DISPUTES .....	27
A.	The Actual Dollar Value of the Unbilled Service .....	27
1.	The Unbilled Service .....	28
2.	The Disconnection Notice .....	28
B.	Dispatch of ComEd Witness Mr. Derrick Moore to the LAZ Facility .....	29
C.	Ms. Spitz's Testimony .....	29
D.	Installation of the LAZ Meter .....	30
E.	Qualifications of ComEd Witness Mr. Rumsey .....	30
F.	ComEd's Meter Constant Discrepancy Report .....	31
VI.	THE FEBRUARY 13, 2014 "ADMISSIONS" .....	32
1.	Rule 216 Requirements .....	32
2.	Admissions that Appear to be Untrue .....	35
3.	Use of Requests for Admission in this Case .....	37
4.	Waiver of "Admissions" .....	38
VII.	COMMISSION ANALYSIS AND CONCLUSIONS .....	38
VIII.	FINDINGS AND ORDERINGS PARAGRAPHS .....	38

**STATE OF ILLINOIS**  
**ILLINOIS COMMERCE COMMISSION**

<b>LAZ Parking LTD, LLC</b>	)	
	)	
<b>-vs-</b>	)	
	)	
<b>Commonwealth Edison Company</b>	)	<b>Docket No. 12-0324</b>
	)	
<b>Complaint pursuant to Sections 9-250 and</b>	)	
<b>10-108 of the Illinois Public Utilities Act</b>	)	
<b>and Section 200.170 of the Rules of</b>	)	
<b>Practice of the Illinois Commerce</b>	)	
<b>Commission.</b>	)	

**DRAFT POSITION STATEMENT**  
**SUBMITTED BY COMMONWEALTH EDISON COMPANY**

**By the Commission:**

**I. Procedural History**

On May 2, 2012, LAZ Parking LTD, LLC ("LAZ") filed a Formal Complaint containing five counts against Commonwealth Edison Company ("ComEd") to contest charges to LAZ for alleged unbilled delivery services. Both the Complainant and the Respondent were represented by counsel. The Administrative Law Judge ("ALJ") conducted a number of pre-hearing conferences and the parties engaged in extensive motion practice, including motions to dismiss and for summary judgment by ComEd and five motions to strike by LAZ, as detailed below.

On November 13, 2012, after the parties exchanged discovery requests and responses, LAZ filed a Motion to Deem Certain Facts Admitted pursuant to Requests for Admission and Responses Thereto. ComEd filed its Response in Opposition on December 17, 2012, and on January 11, 2013, LAZ filed its Reply in Support of its Motion. After this motion was fully briefed, on June 10, 2013 the ALJ held a pre-hearing conference and the parties requested oral argument on the Motion to Deem Certain Facts Admitted. Also on June 10, 2013, ComEd filed a Motion to Dismiss the Complaint on the Merits.

Former ALJ Bonita Benn heard oral argument on the Motion to Deem Certain Facts Admitted on June 28, 2013. ComEd filed Late-filed Exhibits consisting of Illinois statutes, Illinois Administrative Code sections, and case law discussed at oral argument on July 11,

2013 and the Complainant filed its Response on July 26, 2013. LAZ and ComEd each filed Motions to Correct the Transcript on July 18, 2013, and August 1, 2013, respectively. The ALJ issued a ruling correcting the transcript on September 12, 2013. The ALJ held a status hearing on December 4, 2013 and the Complainant moved to voluntarily dismiss Counts 1, 3, and 4 from the Complaint.

On February 13, 2014, the ALJ issued a Notice of Ruling deeming Certain Facts admitted. The next day LAZ filed a Motion to Strike ComEd's Motion to Dismiss the Complaint on the Merits. On February 27, 2014, ComEd filed a Motion to Reconsider the ALJ Ruling of February 13, 2014. LAZ filed its Response to ComEd's Motion to Reconsider on March 27, 2014, and ComEd filed its Reply in Support of its Motion to Reconsider on April 17, 2014. On March 9, 2015 the ALJ issued a Ruling denying ComEd's Motion to Reconsider the ALJ Ruling of February 13, 2014.

On March 13, 2015, the ALJ issued a Notice of Continuance of Hearing and Notice of Schedule. This Notice explained that LAZ's Motion to Strike ComEd's Motion to Dismiss the Complaint on the Merits was held in abeyance and that ComEd was granted leave to file an amended Motion to Dismiss. ComEd filed an Amended Motion to Dismiss on April 30, 2015. On May 14, 2015, LAZ filed a Motion to Clarify, to Strike and to Continue Generally the Hearing on ComEd's Amended Motion to Dismiss.

A status hearing was held on May 29, 2015 at which ALJ Hilliard noted that he had been substituted as the ALJ in this matter. It was also noted that the parties agreed that ComEd would indicate whether they were going to stand on their Amended Motion to Dismiss or whether they were going to file a Motion for Summary Judgment. Subsequently, on June 30, 2015, Respondent ComEd filed a Motion for Summary Judgment. On July 13, 2015, Complainant LAZ filed a Motion to Strike Portions of ComEd's Motion for Summary Judgment and Supporting Affidavits, and to Strike the Schedule for Same. ComEd filed its Response to that Motion on July 24, 2015, and LAZ filed its Reply on July 31, 2015. At the next status hearing on August 5, 2015, ALJ Hilliard denied LAZ's July 13 Motion to Strike.

On September 25, 2015, LAZ filed its Response to ComEd's Motion for Summary Judgment, and on October 19, 2015, ComEd filed its Reply. LAZ then filed a Motion to Strike Portions of ComEd's Reply to LAZ Parking's Response to ComEd's Motion for Summary Judgment on October 23, 2015, and ComEd filed a Response to that Motion on November 6, 2015. On November 9, 2015, the ALJ issued a ruling denying ComEd's Motion for Summary Judgment.

At the November 13, 2015 status hearing, an Evidentiary Hearing date of January 26, 2016 was set. On January 6, 2016, due to substitution of counsel for ComEd, ComEd filed an Unopposed Motion to Extend the Evidentiary Hearing Date. That Unopposed Motion was granted and the Evidentiary Hearing date was continued to March 15, 2016, with a Prehearing Conference set for February 25, 2016.

The parties each submitted Direct Testimony on February 18, 2016, Rebuttal Testimony on March 7, 2016, and Surrebuttal Testimony on March 11, 2016. ComEd presented pre-filed testimony of the following current and former employees: Thomas R.

Rumsey, Retired Meter Mechanic; Derrick E. Moore, Senior Energy Technician; Marisa Spitz, Retired Billing Clerk; and Trishaun Jamison, Senior Business Analyst, Revenue Management. LAZ presented pre-filed panel testimony of Antonio P. DiPaolo, Senior Vice President for the Midwest Region of LAZ Parking Ltd., LLC, and Stuart Vieth, General Manager of LAZ Parking Ltd., LLC. LAZ also presented pre-filed testimony of Richard B. Bernhardt, founder and president of the firm of John-Winston Engineers & Consultants, Inc. in Allenhurst, New Jersey.

After the parties submitted Direct Testimony, on March 4, 2016, Complainant LAZ filed a Motion *in Limine*. Respondent ComEd filed a Response to LAZ's Motion *in Limine* on March 10, 2016, and LAZ filed both its Reply in support of its Motion *in Limine* as well as a Motion to Strike Portions of ComEd's Response to the Motion *in Limine* on March 14, 2016. Complainant LAZ also filed another Motion *in Limine*, titled Second Motion *in Limine* on March 11, 2016, and ComEd filed its Response to LAZ's Second Motion *in Limine* on March 14, 2016.

Pursuant to notice given as required by law and by the rules and regulations of the Commission, the evidentiary hearing in this proceeding was held at the Commission's offices in Chicago, Illinois on March 15, 2016, before a duly authorized ALJ. At the conclusion of the hearing the record was marked heard and taken subject to the late filing of LAZ Exhibit 4.1, the Affidavit of Antonio P. DiPaolo, filed on March 15, 2016.

The parties filed and served Initial Briefs on April 21, 2016. The parties filed and served Reply Briefs on May 13, 2016. The parties filed and served Draft Position Statements on May 20, 2016.

## **I. INTRODUCTION**

### **LAZ's Position**

[Potentially corresponds to LAZ Init. Br. § I.]

### **ComEd's Position**

ComEd explained that there are two different kinds of errors that impact customers' bills: billing errors and meter errors. ComEd further explained that the Illinois Administrative Code sections applicable to the Illinois Commerce Commission ("Commission Regulations") treat these two kinds of errors differently – both in terms of what ComEd must do before issuing adjustments to customer bills and in terms of the time period for which ComEd is permitted to recover. On the one hand, there are no prerequisites to issuing adjustments for billing errors, but ComEd is only permitted to recover for a two year period. On the other hand, there are testing and inspection requirements that ComEd must meet before issuing adjustments for meter errors, but ComEd is permitted to recover for a longer period, up to the life of the meter. ComEd Init. Br. at 1.

ComEd argued that this case involves a simple billing error. As explained by ComEd, ComEd inadvertently under-billed LAZ for almost two and a half years. ComEd admitted it made this billing mistake. As soon as ComEd discovered the error – which ComEd argued was caused by an incorrect billing multiplier, also known as a constant, in ComEd’s Customer Information & Marketing System (“CIMS”) – ComEd fixed it. And pursuant to the Commission Regulations, even though the error went back almost two and a half years, ComEd limited its billing adjustment for this previously unbilled service to two years from the date it provided the delivery service: June 2008 to May 2010. ComEd Init. Br. at 1.

ComEd claimed that despite the fact that ComEd had adhered to the Commission Regulations *and* that LAZ was not asked to pay for almost six months of delivery service that it in fact received and used, LAZ is not satisfied with this outcome. LAZ takes the position that this billing error was actually a meter error. According to ComEd, the evidence shows that LAZ is incorrect. A fully accurate meter registers the electricity flowing through it at 100%. The Commission Regulations define meter error as under or over registration of that electricity in excess of 2%. Therefore, in order to experience meter error, a meter must register less than 98% or greater than 102% of actual electricity flowing through it. ComEd argued that LAZ has failed to meet its burden to prove by a preponderance of the evidence that the meter at issue in this case registered outside of this acceptable range. ComEd Init. Br. at 1-2.

ComEd asserted that to the contrary – the evidence shows that at all times the equipment at issue at LAZ’s facility at 25 N. Michigan Ave. in Chicago, IL (“LAZ Facility”) was functioning as it was designed to do, and was accurately registering energy usage within the 98% to 102% range determined by the Commission Regulations. Moreover, ComEd argued that the evidence shows what caused the error at issue: an incorrect constant in CIMS. According to ComEd, this is clearly a billing error that is not in any way related to a meter malfunction. ComEd further stated that even if there was evidence that the equipment did register energy usage erroneously – and according to ComEd there is not – ComEd met the testing and accuracy requirements in the Commission Regulations, and would actually be allowed to correct the under billing for the entire two and a half years as opposed to the two year limit applicable to billing errors. ComEd Init. Br. at 2.

ComEd contended that LAZ twists and tortures the Commission Regulations to come up with an interpretation that suits its purpose. ComEd stated that what LAZ essentially argues is that ComEd must go above and beyond the testing and accuracy requirements in the Commission Regulations and conduct additional testing – as specified by LAZ – to ensure that mistakes never happen. As ComEd explained, there are two main problems with this. First, that is not the regulatory balance the Illinois Commerce Commission (“ICC” or “Commission”) has struck. The Commission Regulations prescribe specific testing and accuracy requirements and contemplate that pursuant to those requirements, some mistakes will still occur. Second, the additional testing that LAZ recommends is a useless exercise that would not have prevented the billing error in this case. ComEd Init. Br. at 2.

ComEd stated that in order to compensate for the lack of merit in its case, LAZ rails against ComEd – accusing ComEd of being a “recidivist utility” and of suffering from “judicial Tourette’s syndrome.” LAZ Reply to Response of ComEd to First Motion *In Limine* (March 14, 2016) at 9; LAZ Second Motion *In Limine* (March 11, 2016) at 2. ComEd further stated that LAZ has in effect waged war against ComEd, filing five motions to strike and obtaining and using patently false “admissions.” ComEd argued that it admitted only that it made a billing mistake. ComEd stated that it regrets making that mistake. Moreover as ComEd noted, LAZ’s own expert admitted that ComEd’s policies and procedures regarding testing and accuracy comply with the Commission Regulations. According to ComEd, the Commission should enter judgment in favor of ComEd. ComEd Init. Br. at 2-3.

In reply, ComEd noted that the Initial Brief of LAZ Parking LTD, LLC (“LAZ Initial Brief” or “LAZ’s Initial Brief”) is more notable for what it does not say than for what it does say. LAZ’s Initial Brief never claims that Meter No. 141362866 (“LAZ Meter”) experienced under-registration of electricity usage in any amount, let alone under-registration that rises to the level of meter error as defined by the Commission Regulations. According to ComEd, LAZ’s entire case, however, rests on a finding of under-registration or meter error. ComEd Reply Br. at 1.

ComEd stated that LAZ argues that Section 410.200 of the Commission Regulations is applicable to this case, specifically that section 410.200(h)(1) requires ComEd to refund the amounts LAZ paid for delivery of energy that LAZ undisputedly consumed because ComEd allegedly failed to perform the type of post-installation inspection that LAZ recommends. See, e.g., LAZ Init. Br. at 8. But ComEd observed that section 410.200(h)(1) prohibits adjustments only for *under-registration* when certain testing and accuracy requirements have not been met. 83 Ill. Admin. Code § 410.200(h)(1). ComEd Reply Br. at 1. ComEd argued that LAZ has not provided any evidence that the LAZ Meter under-registered electricity usage in any amount, let alone in excess of 2%. Indeed, as ComEd contended, the undisputed evidence in this case shows that at all times, the LAZ Meter was accurately registering LAZ’s energy usage.

Therefore, according to ComEd, LAZ’s entire argument that ComEd was prohibited from making an adjustment to LAZ’s bill because ComEd allegedly did not perform a post-installation inspection is not valid because 410.200(h)(1) prohibits adjustments only in cases where there is under-registration. ComEd contended that the Commission Regulation LAZ claims prohibits ComEd’s billing adjustment in this case is therefore inapplicable and the Commission’s only lawful course of action is to enter an order denying relief to LAZ and finding in favor of ComEd. ComEd Reply Br. at 1-2.

## **II. UNDISPUTED FACTUAL BACKGROUND**

ComEd witness Mr. Thomas Rumsey testified that all customers use meters to measure the amount of electrical current that ComEd delivers. Certain customer facilities, however, use more electrical current than any of ComEd’s meters can handle. ComEd Ex. 1.0 at 7. In that situation, ComEd utilizes between one and three identical current transformers (“CTs”) (one CT for each of the meter’s phases or hot wires), in conjunction

with a transformer rated meter. *Id.* The electrical current flows through the CTs and is “stepped down” to a level the meter can handle. *Id.* The meter and associated equipment in use at the LAZ Facility and at issue in this case was Meter No. 141362866 (“LAZ Meter”) and its three associated current transformers (“LAZ CTs”). *Id.* at 12. ComEd Init. Br. at 3.

Mr. Rumsey explained that because the electrical current flowing through the meter is stepped down, CIMS must multiply the meter data in order to properly bill for the customer’s actual usage. ComEd Ex. 1.0 at 7. CIMS uses information about the CT: its model type and size, to determine that billing multiplier, which is known as a constant. *Id.* The constant is not a tangible piece of equipment. *Id.* at 13. It is a piece of information generated by CIMS, completely separate from the meter. *Id.* ComEd Init. Br. at 3.

The model type and size of the LAZ CTs indicates that for every 3,000 amps that flowed through the LAZ CTs, only 5 amps flowed through to and registered on the LAZ Meter. Thus as explained by Mr. Rumsey, ComEd should have multiplied the actual usage registered on the LAZ Meter by 600 (3,000 divided by 5) to generate a bill for the correct usage. ComEd Ex. 1.0 at 12-13. This ratio would be expressed as a constant of 600 kilowatt hours (“kWh”). *Id.* at 13. The constant also has a second component for the commercial demand charge of 0.18 kilowatts (“kW”). *Id.* This 0.18 kW figure is determined pursuant to a formula that uses the 600 kWh figure. *Id.*; ComEd Ex. 3.0 at 6; ComEd Ex. 3.05. ComEd Init. Br. at 4.

Mr. Rumsey testified that ComEd and LAZ worked together to initially install the LAZ CTs in August 2000. ComEd Ex. 1.0 at 8, 14-15. According to Mr. Rumsey and ComEd witness Ms. Marisa Spitz, after this initial installation, ComEd was using the correct constant in CIMS and LAZ’s bills correctly reflected LAZ’s actual usage. *Id.* at 15; ComEd Ex. 3.0 at 7; ComEd Ex. 3.04. On December 14, 2007, ComEd installed the LAZ Meter. ComEd Ex. 1.0 at 14. As Ms. Spitz explained, at this point, for reasons unknown, ComEd inadvertently began using an incorrect constant in CIMS and LAZ’s bills no longer correctly reflected LAZ’s actual usage. ComEd Ex. 3.0 at 7; ComEd Ex. 3.04. Ms. Spitz further explained that the constant information in CIMS was correct prior to the meter exchange, but somehow that information was changed in CIMS when ComEd exchanged the LAZ Meter on December 14, 2007. ComEd Ex. 3.0 at 7. According to ComEd, at this point, LAZ’s bills dropped by approximately 600% from their pre-2008 levels. See ComEd Ex. 3.04 (showing decline); ComEd Ex. 8.0 (explaining decline). ComEd Init. Br. at 4.

ComEd also testified that on April 6, 2010, also for reasons not entirely known although possibly related to the decline in LAZ’s bills, ComEd dispatched its employee Mr. Derrick Moore to the LAZ Facility with the purpose of obtaining information regarding the equipment in use by LAZ. ComEd Ex. 2.0 at 2. Specifically, as reflected in the “Issuance Comments” of the Order Completion Data Report, attached to ComEd witness Mr. Moore’s testimony as ComEd Ex. 2.03, he was tasked with acquiring CT information for the LAZ Meter and updating CIMS with that information. *Id.* Mr. Moore explained that among other things, he recorded the size (3,000) and ratio (600) of the CTs in use with the LAZ Meter. *Id.* at 3. Once he completed the information collection, he entered

everything into his Mobile Dispatch Terminal (“MDT”), which is a laptop computer. This information was then transferred to a Field & Meter Services (“F&MS”) clerk who input the data into CIMS. *Id.* ComEd Init. Br. at 4-5.

Ms. Spitz testified that CIMS issues a weekly Meter Constant Discrepancy Report (“Constant Report”). The Constant Report alerts ComEd if there are any discrepancies between the equipment in use by ComEd’s customers and the constant information entered into CIMS. ComEd Ex. 3.0 at 4. The April 23, 2010 Constant Report, generated after Mr. Moore’s LAZ Facility visit and after the F&MS clerk updated CIMS, indicated for the first time that there was an issue with the constant entered into CIMS for the LAZ Meter. *Id.*; ComEd Ex. 3.03; Tr. at 408 (Spitz, March 15, 2016). Ms. Spitz further explained that specifically, the Constant Report indicated that given the equipment in use by LAZ, there was a discrepancy between the constant CIMS would expect ComEd to use (the “Calculated Constant”) and the constant actually in use in CIMS (the “CONSTANT IN CIMS”). *Id.* As shown on ComEd Ex. 3.03, the Calculated Constant for the LAZ Meter was 600 kWh /0.18 kW. The CONSTANT IN CIMS was 1 kWh /0.0003 kW. ComEd Ex. 3.0 at 5. ComEd Init. Br. at 5.

After seeing the April 23, 2010 Constant Report, Ms. Spitz obtained and reviewed a CIMS Meter Reading History for the LAZ meter. ComEd Ex. 3.0 at 5; ComEd Ex. 3.04. This document contains historical billing information for the LAZ Meter from June 5, 2007 through May 3, 2010. *Id.* Ms. Spitz explained that she then caused CIMS to cancel the incorrect bills for delivery service provided in the June 3, 2008 to May 3, 2010 time period. *Id.* at 6. She then corrected the constant in CIMS. *Id.* Next, she issued re-bills for the full amount of the delivery service provided in the same time period, keyed to the meter read date of May 5. *Id.* at 6-7. As ComEd explained, CIMS then automatically issued a credit in the amount that ComEd had already billed and that LAZ had already paid for this time period. *Id.* at 7; ComEd Ex. 4.0 at 5-6. ComEd’s testimony in this case indicates the dollar values that these re-bills and credits amounted to, and the resulting total amount that ComEd under-billed LAZ (re-bill amount less credit provided). ComEd Ex. 4.0 at 5-6. ComEd Init. Br. at 5-6.

Ms. Spitz testified that the CIMS Meter Reading History for the LAZ meter indicated that the under-billing went back to the date ComEd exchanged the meter on December 14, 2007. ComEd Ex. 3.0 at 7. ComEd, however, is only permitted to issue re-bills for billing errors for two years from to the date it provided the delivery service. 83 Ill. Admin. Code § 280.100. Therefore, ComEd explained that it limited the re-billing to the two-year period from June 3, 2008 to May 3, 2010. ComEd Ex. 3.0 at 7. ComEd further explained that this means that no matter what the outcome of this case is, ComEd did not bill LAZ for most of its usage for almost six months of delivery service, from December 2007 to May 2008. *Id.* ComEd Init. Br. at 6.

ComEd witness Mr. Rumsey as well as LAZ panel witnesses Messrs. Antonio P. DiPaolo and Stuart Vieth testified that since ComEd corrected the constant in CIMS, LAZ’s bills have returned to normal pre-2008 levels and have accurately reflected LAZ’s electricity usage. See, e.g., LAZ Ex. 1.0 at 5-6; ComEd Ex. 1.01, Affidavit of Thomas R.

Rumsey, ¶¶ 12, 13. Mr. Rumsey explained that after ComEd corrected the constant in CIMS, ComEd did not remove or adjust the LAZ Meter or LAZ CTs. ComEd Ex. 1.0 at 14. To the contrary, as Mr. Rumsey explained, after ComEd corrected the constant in CIMS, the LAZ Meter and the LAZ CTs continued in service at the LAZ Facility. *Id.* ComEd Init. Br. at 6-7.

### **III. APPLICABILITY OF SECTION 410.200**

#### **A. The Regulatory Framework**

##### **LAZ's Position**

[Potentially corresponds to LAZ Init. Br. §§ III.A. and B. and LAZ Reply Br. §§ I.A. and B.]

##### **ComEd's Position**

Mr. Rumsey stated that almost every error that results in a change to a customer bill will in some way involve a meter. ComEd Ex. 1.0 at 10. But that does not mean that every error is a meter error. *Id.* ComEd explained that there are, in fact, two types of errors that result in changes to customers' bills: (1) meter errors as regulated by Part 410 of the Commission Regulations; and (2) unbilled or mis-billed errors, as regulated by Part 280 of the Commission Regulations. *Compare* 83 Ill. Admin. Code § 410.200 with § 280.100. *See also* ComEd Ex. 1.0 at 10. ComEd Init. Br. at 7.

As ComEd discussed in its Initial Brief, the Commission Regulations narrowly and purposefully define meter error as under or over registration of electricity usage in excess of 2%, *i.e.*, registration less than 98% or greater than 102%. *See generally* 83 Ill. Admin. Code § 410.10 *et seq.*, *specifically* 83 Ill. Admin. Code §§ 410.140 - 410.200. ComEd explained that in turn, ComEd's policies and procedures regarding meter testing and inspection are only geared toward preventing, detecting, and correcting meter error. ComEd Ex. 1.0 at 10. They will not prevent, detect, or correct error related to something other than a malfunctioning meter and/or its associated equipment. *Id.* ComEd Init. Br. at 7.

ComEd explained that this distinction between meter errors and billing errors is important because Part 410 contains the pre-installation testing and post-installation inspection requirements that a utility must meet before the utility can issue a billing adjustment due to meter error. 83 Ill. Admin. Code § 410.200(h)(1). Part 280, relating to billing errors, does not contain those testing and inspection requirements. *See* 83 Ill. Admin. Code § 280.100. So, as ComEd argued, whether ComEd met the Part 410 testing and inspection requirements is only directly relevant if the error at issue here is a meter error as opposed to an unbilled error. ComEd Ex. 1.0 at 12. ComEd asserted that this is an important preliminary – and potentially dispositive – issue in this case. ComEd Init. Br. at 7-8.

## **1. Part 410**

### **a) Meter Error**

ComEd stated that the Commission Regulations explain that meter error occurs when a meter is tested and found to be malfunctioning because it is running too fast (over-registering), too slow (under-registering), non-registering, or on analog meters exhibiting “creep” as that term is defined in the Commission Regulations. ComEd Ex. 1.0 at 6; 83 Ill. Admin. Code §§ 410.200(c)-(e), (g). Specifically, meter error exists “whenever any test by any entity or by the Commission shows a meter to have an average error of more than 2%.” See 83 Ill. Admin. Code §§ 410.200(a) and (b). Section 410.10 defines “average error” as “the difference between 100% and the average percent registration as defined in Section 410.150(d).” 83 Ill. Admin. Code § 410.10. ComEd Init. Br. at 8.

Section 410.150(d) provides that the “average percent registration of a watt-hour meter shall be determined by adding the light load registration to 4 times the heavy load registration and dividing that quantity by 5.” 83 Ill. Admin. Code § 410.150(d). Section 410.150(e)(1)(A) applies the same standards to demand meters. In this manner, the Commission Regulations narrowly and purposefully define meter error, and it is limited to whether electric usage registered in excess of the specified margin of error on the physical meter. ComEd explained that it is important to note that even incorrect registration of electric usage within that margin of error does not rise to the level of meter error. ComEd noted that LAZ did not even claim that the LAZ Meter over or under registered electric usage, let alone over or under registered in excess of the 2% margin of error. ComEd Init. Br. at 8-9.

### **b) Pre-Installation Testing**

Pre-installation testing is also governed by specific Commission Regulations: 83 Ill. Admin. Code Section 410.140 *et seq.* Those Commission Regulations provide the protocol for meter testing, including sample testing procedures. See, e.g., 83 Ill. Admin. Code § 410.180; Tr. at 349-350 (Rumsey). Specifically, ComEd explained that the Commission has approved (and ComEd uses) the ANSI/ASQC Z1.4-1993 sampling procedure as provided in 83 Ill. Admin. Code Section 410.180(a)(1). ComEd Ex. 1.0 at 5. ComEd Init. Br. at 9.

ComEd further explained that for those meters selected in the sample process, section 410.150, titled “Meter Accuracy Requirements,” outlines test criteria for determining the accuracy of meters as well as providing the limits of accuracy for the tests. ComEd Ex. 1.0 at 6; 83 Ill. Admin. Code §§ 410.150(a) and (b). If a meter can pass the tests presented in section 410.150(a), within the limits identified in section 410.150(b), it is considered to be accurately recording power usage. See 83 Ill. Admin. Code §§ 410.150(a) and (b). The test criteria presented in section 410.150(a) are: Light Load test, Heavy Load test, and Power Factor test. 83 Ill. Admin. Code § 410.150(a). The limits of accuracy vary from 1% to 2%. 83 Ill. Admin. Code §§ 410.150(b), 410.180(f), 410.200(a) and (b). ComEd Init. Br. at 9.

Mr. Rumsey testified that in addition, prior to sample testing, ComEd requires that its manufacturers test all new meters prior to shipment to ComEd. ComEd Ex. 1.0 at 5; Tr. at 349 (Rumsey); 83 Ill. Admin. Code § 410.110 (1) (contemplating “testing data provided by the manufacturer that is used by the entity for acceptance testing of the meter”). Each shipment contains an electronic list of meters with serial numbers, types, sizes, and test results for each meter. ComEd Ex. 1.0 at 5. ComEd loads that information into its Automated Metering Infrastructure (“AMI”) Device Management database (“ADM”). *Id.* ComEd performs similar manufacturer and sample testing on associated equipment, such as CTs. *Id.* at 7. ComEd noted that the LAZ Meter underwent pre-installation testing and passed. ComEd Init. Br. at 9-10.

### **c) Post-Installation Inspection**

In addition to pre-installation testing, for meters with associated instrument transformers – such as CTs – the Commission Regulations require that the utility also conduct a post-installation inspection under load within 90 days after installation. 83 Ill. Admin. Code § 410.155. Mr. Rumsey explained that during this inspection, a utility technician makes sure that the current and voltage wiring from the associated equipment to the meter fitting is correct. ComEd Ex. 1.0 at 9. Mr. Rumsey noted that because the inspection is under load, the technician is able to ensure that the current flowing through the meter is forward as opposed to backward or reverse. *Id.* ComEd Init. Br. at 10.

As explained by Mr. Rumsey, the point of this is to determine – as far as is possible without actually testing the meter – that the meter is accurately measuring customer energy consumption. *Id.* According to ComEd, the Commission Regulations do not call for further testing during this inspection because prior to installation, the meter and CTs were tested and deemed accurate. Tr. at 381 (Rumsey). Thus, Mr. Rumsey testified that after installation the utility need only determine that “the connection between the two is proper and ... the current and everything is flowing through forward,” then “we can say that it’s accurately recording the customer’s usage because they’ve all been certified as being accurate.” Tr. at 381-382 (Rumsey). ComEd provided evidence that its pattern and practice would have been to conduct this inspection and ComEd argued that there is no evidence to indicate that ComEd failed to conduct this inspection. ComEd Init. Br. at 10.

In reply, ComEd explained that section 410.155 does not apply to all meters that ComEd installs. It applies specifically to “any meter with associated instrument transformers and/or phase-shifting transformers.” 83 Ill. Admin. Code § 410.155. ComEd noted that LAZ recognized this distinction, stating that post-installation inspections “under Commission Regulation 410.155 are done only for transformer-rated metering installations ...” LAZ Init. Br. at 19. From this limited applicability, LAZ deduced that the purpose of a post-installation inspection is to protect “only large, high-dollar value customers,” and that a post-installation inspection must therefore be a test. *Id.* See also LAZ Ex. 3.0 at 8 (implying that there should be higher testing and inspection standards for well-heeled customers who provide more revenue to ComEd). ComEd argued that this is incorrect. ComEd Reply Br. at 12.

ComEd stated that the purpose of a post-installation inspection is to ensure the proper connection between a meter and its associated transformers. That is why it applies only to meters with associated equipment, as opposed to all meters. As Mr. Rumsey testified, the Commission Regulations do not call for further testing during this inspection because prior to installation, the meter and CTs were tested and deemed accurate. Tr. at 381 (Rumsey). Thus, as explained by ComEd, after installation the utility need only determine that the connection between the two is proper and therefore the meter will accurately record the customer's usage. *Id.* at 381-382 (Rumsey). ComEd Reply Br. at 12.

Moreover, ComEd asserted that if the Commission Regulations intended to require post-installation testing, as LAZ argues, the Commission Regulations would likely require post-installation testing of all meters, not just meters with associated equipment. And, surely section 410.155 would provide some indication of what type of testing ComEd would allegedly need to perform – by reference to the meter accuracy requirements in other portions of Part 410 or otherwise. ComEd observed that section 410.155 contains no such discussion. ComEd Reply Br. at 12-13.

**d) Part 410 Contemplates that Some Errors Will Still Occur**

Mr. Rumsey explained that the pre-installation testing and post-installation inspection help to ensure that the meter and associated equipment are accurate and that the meter does not experience meter error, *i.e.*, over or under registration in excess of 2%. ComEd Ex. 1.0 at 6. ComEd further explained that this testing and inspection, however, will not prevent all meter errors. Indeed, the Commission contemplates that a certain amount of these errors will occur – hence the existence of section 410.200. The Commission Regulations also provide that corrections to metering data due to meter error may extend back to the in-service date of the meter or the date the customer first occupied the premises at issue. 83 Ill. Admin. Code § 410.200(f). ComEd Init. Br. at 11.

In reply ComEd argued that LAZ's position ignores this well-settled framework and seeks to apply the section 410.200 testing and accuracy requirements *without any evidence of any registration error, let alone meter error* as defined by the Commission Regulations. ComEd contended that LAZ essentially cherry picks from the Commission Regulations, ignoring those subsections of section 410.200 that would impede its recovery or expand the time period for ComEd's billing adjustment. ComEd explained that this is improper. "Administrative regulations have the force and effect of law and are interpreted with the same canons as statutes." *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130 at ¶ 38, *citing Madigan v. Illinois Commerce Comm'n*, 231 Ill. 2d 370, 380 (2008). "Regulatory provisions, like statutory provisions, must be read in concert and harmonized." *Id.* at ¶ 50. ComEd asserted that LAZ's position reads section 410.200(h)(1) separate and apart from the remainder of the Commission Regulations. ComEd Reply Br. at 2-3.

ComEd stated that in order to understand the multiple flaws in LAZ's position, it is helpful to look at the full text of section 410.200, as opposed to the single subsection that LAZ excerpts. See LAZ Init. Br. at 8. In its entirety, section 410.200 provides:

#### 410.200. Corrections and Adjustments for *Meter Error*

a) *Whenever any test made by any entity or by the Commission shows a meter to have an average error of more than 2%, a correction of the metering data shall be determined* by the entity providing metering service and that correction shall be conveyed within 3 business days to the customer and to other entities involved in billing the customer.

b) When a meter is found to have an average error of more than 2%, the entity providing metering service shall determine the *metering data correction* using the actual percentage of error as determined by the test, not the difference between the allowable error and the error found as a result of a test.

c) If the meter is found to run faster than allowable, the entity providing metering service shall determine the correction to the metering data for that meter. In determining the correction it shall be presumed, unless demonstrated otherwise, that the inaccuracy has existed for a period of 2 years. This period of presumed inaccuracy shall not exceed the time for which records of the current customer's usage exist.

d) If the meter is found to be slower than allowable, the entity providing metering service shall determine the correction to the metering data for that meter. In determining the correction, it shall be presumed, unless demonstrated otherwise, that the inaccuracy has existed for a period of 1 year prior to the test for small commercial and residential customers and 2 years prior to the test for all other customers.

e) In the case of a non-registering meter that has been read during the period of non-registration, the entity providing metering service shall not determine a correction to metering data for estimated consumption extending over more than twice the regular interval between readings.

f) *No corrections to metering data for meter error shall extend beyond the in-service date of the meter discovered to be in error*, nor shall any correction be required to extend beyond the date upon which the current customer first occupied the premises at which the error is discovered.

g) Whenever an entity or the Commission's representative finds that a service watt-hour meter, while in service, exhibits creep, the entity shall make an estimate of the registration caused by the creep during the period as specified under subsection (c) and shall make a corresponding correction in the metering data.

h) Billing adjustments

1) For electric utilities. Any correction to metering data for over-registration shall be accompanied by an adjustment to customer billing by any electric utility that rendered service that is affected during the period of adjustment. *Corrections made to metering data for under-registration may be accompanied by an adjustment to a customer's billing. However, if an electric utility is providing metering service, in no case shall an adjustment to a customer's billing be made for under-registration if all testing and accuracy requirements of this Part have not been met.*

2) For entities other than electric utilities. Any correction to metering data made by any entity other than an electric utility and all records relating to the adjustment of the customer's billing or charges shall be retained for at least 2 years.

i) Provisions of this Section do not apply to situations in which the customer's wires, meters or other service equipment have been tampered with and the customer enjoyed the benefit of the tampering.

83 Ill. Admin. Code § 410.200 (emphasis added). ComEd Reply Br. at 3-4.

ComEd stated that in this case LAZ seeks to apply the section 410.200(h)(1) testing and accuracy requirements without regard to the plain language of that subparagraph and without reference to the remainder of section 410.200, and thus *without any evidence of any under-registration, let alone under-registration rising to the level of meter error* as defined by the Commission Regulations. ComEd noted that LAZ then inexplicably attempts to apply a different limitation period to the alleged corrections and adjustments for meter error than the one clearly articulated in section 410.200(f). LAZ Init. Br. at 19 (applying the 2 year period in section 280.100, which governs billing errors, not meter errors). ComEd Reply Br. at 5-6.

ComEd contended that LAZ apparently believes that every error – regardless of whether it involves under-registration or meter error – is subject to the testing and accuracy requirements in section 410.200(h)(1), but not the billing adjustment period in section 410.200(f). *Compare, e.g.,* LAZ Init. Br. at 3 (conflating section 410.200 accuracy requirements related to meter error with section 280.100 related to unbilled service); *and* 4 (conflating *unbilled* service with *unpaid* service); *with* LAZ Init. Br. at 4, 19 (applying 2 year period in section 280.100 to all amounts at issue in this case). ComEd argued that the Commission should reject this outright. ComEd also explained that LAZ's position is contrary to the evidence in this case. ComEd Reply Br. at 6.

## **2. Part 280**

Section 280.100, titled "Previously Unbilled Services," applies to situations where something other than a meter error has caused a customer to be billed incorrectly. This includes human error related to the billing process that may result in billing mistakes. Section 280.100 provides in relevant part:

- a) Intent: This Section provides for the billing and payment of previously unbilled service caused by errors in measuring or calculating a customer's bills.
- b) Time Limits:
  - 1) Bills for any utility service, including previously unbilled service, supplied to a residential customer shall be issued to the customer within 12 months after the provision of that service to the customer.
  - 2) Bills for any utility service, including previously unbilled service, supplied to a non-residential customer shall be issued to the customer within 24 months after the provision of that service to the customer.

83 Ill. Admin. Code § 280.100. This section was amended in 2014. The prior version of section 280.100 was titled “Unbilled Service” and provided in relevant part:

- a) A utility may render a bill for services or commodities provided to:
  - 1) A residential customer only if such bill is presented within one year from the date the services or commodities were supplied, or
  - 2) A non-residential customer only if such bill is presented within two years from the date the services or commodities were supplied.
- b) No customer shall be liable for unbilled or mis-billed service after expiration of the applicable period except in those instances to which 83 Ill. Adm. Code 500.240(a), 83 Ill. Adm. Code 410.260(c), or the following subsections of this Section apply.

83 Ill. Admin. Code § 280.100 (West 1992). ComEd Init. Br. at 11-12.

ComEd explained that it utilizes specific procedures, such as Constant Reports generated by CIMS, to detect and correct unbilled errors. These reports, however, will not prevent such errors. Indeed, the Commission contemplates that a certain amount of these errors will occur – hence the existence of section 280.100. Unlike situations involving meter error, however, the Commission has not set forth any testing and accuracy requirements related to these errors. The Commission has, however, instituted a two-year limitation on re-billing for unbilled errors. 83 Ill. Admin. Code § 280.100(b)(2). ComEd Init. Br. at 12.

ComEd argued that it is worth noting that LAZ itself also contemplates that billing errors may occur. Specifically, LAZ has a project manager review bills prior to payment.

LAZ Ex. 1.0 at 5-7. ComEd noted that the project manager “and the accounts payable function focuses on the total amount of the bill” and if “something unusual appeared in the bill, LAZ Parking would investigate it with the supplier.” *Id.* at 5, 6. Interestingly, ComEd contended, LAZ has offered no evidence showing that when LAZ’s bill went down by about 600%, LAZ “investigated.” See ComEd Ex. 3.04 (showing decline); ComEd Ex. 8.0 (explaining decline). According to ComEd, LAZ only “investigated” when the bill went back up to LAZ’s normal levels. See, e.g., LAZ Ex. 1.0 at 5-6; ComEd Ex. 1.01, Affidavit of Thomas R. Rumsey, ¶¶ 12, 13. ComEd Init. Br. at 12-13.

## **B. The Error in this Case**

### **LAZ’s Position**

[Potentially corresponds to LAZ Init. Br. § IV.G.]

### **ComEd’s Position**

#### **1. There Was No Meter or Associated Equipment Error**

For the Commission Regulation regarding “Corrections and Adjustments for Meter Error” – section 410.200 – and its testing and inspection requirements to apply, a test must show the meter to have an average error of more than 2%. 83 Ill. Admin. Code §§ 410.200(a)-(b), (h). Mr. Rumsey explained that the test results for the LAZ Meter were: 100.01% in Heavy Load; 100.00% in Light Load; and 100.01% in Power Factor. ComEd Ex. 1.0 at 13; ComEd Ex. 1.06. As ComEd noted, this is well within both the 1% to 2% error allowed pursuant to the meter accuracy requirements in the Commission Regulations and the 2% error threshold for section 410.200, *i.e.*, test results within the 98% or 99% to 101% or 102% range. 83 Ill. Admin. Code §§ 410.150(b), (d), (e); 410.200(a)-(b), (h). ComEd Init. Br. at 13. Therefore, ComEd argued that the LAZ Meter did not experience under-registration in any amount and certainly did not experience under-registration rising to the level of meter error. ComEd stated that section 410.200 clearly does not apply. ComEd Reply Br. at 6.

Moreover, according to ComEd, it is undisputed that the LAZ Meter accurately recorded the stepped-down usage flowing through the LAZ CTs to the LAZ Meter. ComEd Ex. 1.0 at 15. There was no under-registration, over-registration, non-registration, or creep. *Id.* ComEd stated that it is also undisputed that the LAZ CTs were accurately stepping down the usage flowing through the LAZ CTs to the LAZ Meter. *Id.*; Tr. at 334 (LAZ witness Bernhardt issued his opinions in this case despite being unaware of whether the LAZ CTs functioned accurately and did not know that the LAZ CTs are still in use). ComEd noted that they did not cause under-registration, over-registration, non-registration, or creep. ComEd Ex. 1.0 at 15. Therefore, as ComEd stated there is no meter or associated equipment error and again section 410.200 does not apply. *Id.* ComEd Init. Br. at 13. ComEd Reply Br. at 6-7.

In addition, as Mr. Rumsey testified, if the LAZ Meter or LAZ CTs had experienced error, ComEd would have removed the faulty equipment from service and notified the

ComEd billing department of the percentage of error. ComEd Ex. 1.0 at 6. Mr. Rumsey explained that to the contrary, after ComEd corrected the constant in CIMS, the LAZ Meter and the LAZ CTs continued in service at the LAZ Facility. *Id.* at 14. According to Mr. Rumsey, this would not have happened if there had been any meter or associated equipment error. *Id.* ComEd Init. Br. at 14. Once again, ComEd noted that section 410.200 clearly does not apply. ComEd Reply Br. at 7.

In reply, ComEd observed that LAZ attempted to cast doubt on these undisputed facts by stating that the testing that its witness recommends would “indisputably determine whether 141362866 was accurately measuring LAZ’s energy consumption” and that “CT burden testers of the type shown in LAZ Parking Exhibit 2.2 would have confirmed whether the CT ratios on LAZ Parking’s metering installation were correct.” LAZ Init. Br. at 18. ComEd stated that this is much ado about nothing. As ComEd has shown, none of this is in dispute: there is no evidence that the LAZ Meter over- or under-registered in any amount, let alone in excess of 2%; and there is no evidence that the LAZ CTs inaccurately stepped down the power traveling to the LAZ Meter. ComEd Init. Br. at 13-15. Therefore, as ComEd stated, there is no need to use testing to determine what the evidence already shows: the LAZ Meter and the LAZ CTs were accurate and did not experience any error. ComEd Reply Br. at 7.

Indeed, ComEd contended that LAZ’s own Exhibit A clearly states that ComEd “calculated the billing adjustment from 6/3/08-5/5/10 based on *actual reads taken from the meter* and made the appropriate corrections.” Ex. A to LAZ Init. Br. (emphasis added). If the meter had under- or over-registered, the actual meter reads would have been incorrect, and ComEd would not have been able to utilize them. Instead, ComEd would have had to determine a percentage of error and would have then issued a metering data correction to the actual meter reads based on that percentage of error. See 83 Ill. Admin Code § 410.200(a). ComEd Reply Br. at 8.

ComEd concluded that whatever happened in this case, it is not, never was, and never will be under-registration or meter error. The issue here is that LAZ was billed for only a fraction of its actual usage because ComEd used the wrong constant in CIMS for a two-and-a-half year period. ComEd Ex. 1.0 at 15-16. Contrary to LAZ’s statements in its Initial Brief (LAZ Init. Br. at 17), ComEd stated that it has shown that no matter what constant is used, *the registration of usage by the meter* remains unaffected. ComEd Ex. 1.0 at 15-16. As explained by ComEd, the re-billing in this case was therefore not attributable in any respect to an error in the LAZ Meter or LAZ CTs. ComEd Ex. 3.0 at 8; ComEd Ex. 1.0 at 13-14. The re-billing described above was a billing error attributable solely to the incorrect meter constant in CIMS. *Id.* ComEd Reply Br. at 8.

## **2. The Error Was a Billing Error**

ComEd asserted that the issue here is that LAZ was billed for only a fraction of its actual usage because ComEd used the wrong constant in CIMS for a two and a half year period. ComEd Ex. 1.0 at 15-16. As explained by Mr. Rumsey, no matter what constant is used, however, the registration of usage by the meter remains unaffected. *Id.* According to ComEd, the re-billing in this case was therefore not attributable in any

respect to an error in the LAZ Meter or LAZ CTs. ComEd Ex. 3.0 at 8; ComEd Ex. 1.0 at 13-14. Rather, as ComEd argued, the re-billing described above was attributable solely to the incorrect meter constant in CIMS. *Id.* ComEd Init. Br. at 14.

Ms. Spitz testified that the incorrect constant, or CONSTANT IN CIMS as shown in the Constant Report (ComEd Ex. 3.03), caused ComEd to under-bill LAZ for delivery service by a factor of 600. ComEd Ex. 3.0 at 6. As Ms. Spitz explains in her testimony, this is borne out by a simple mathematical ratio between the incorrect constant and the correct constant of one to 600 and 0.0003 to 0.18. *Id.* Therefore, ComEd argued that it properly back billed for a two year period pursuant to section 280.100. ComEd Init. Br. at 14.

ComEd stated that if this had been a meter error, ComEd would have back-billed for a longer period: to the in-service date of the LAZ Meter. See 83 Ill. Admin. Code § 410.200(f). But according to ComEd, because this is not a meter error, Part 410 – and its testing and accuracy requirements *and* longer billing adjustment period – does not apply. ComEd explained that even LAZ’s own witness describes this as “an obvious failure in ComEd’s *customer billing process*.” LAZ Ex. 2.0 at 13 (emphasis added). Further, ComEd argued that LAZ claims that the two-year limitation applicable to billing errors applies to the instant situation – as opposed to the longer period applicable to meter errors – essentially admitting that this is a billing error, not a meter error. See, e.g., Complaint at ¶¶ 17 and 46, page 12 ¶ (e). ComEd contended that this should be the end of the inquiry in this case, and the Commission should enter judgment in favor of ComEd. ComEd Init. Br. at 14-15.

#### **IV. SECTION 410.200 TESTING AND ACCURACY REQUIREMENTS**

##### **A. The Requisite Pre-Installation Tests**

As ComEd explained, it is undisputed that the manufacturer, Elster Manufacturing, tested the LAZ Meter on October 25, 2007. Mr. Rumsey testified that ComEd entered that test data into ComEd’s pre-2014 meter shop database, known as Automated Micro Systems (“AMS”). ComEd Ex. 1.0 at 13; ComEd Ex. 1.06. In addition, as shown on ComEd Ex. 1.07, the LAZ Meter was part of a shipment that ComEd tested through its sampling procedure. ComEd Ex. 1.0 at 13. Average percent registration results for sample tested meters between 98% and 102% are considered accurate and acceptable by the Commission. See 83 Ill. Admin. Code § 410.180(f). See *also* ComEd Ex. 1.0 at 13. ComEd stated that the test results indicate that the LAZ Meter was well within this range and was accurately registering power usage. ComEd Init. Br. at 15.

Moreover ComEd argued that similar to the LAZ meter, it is undisputed that the manufacturer, General Electric, would have tested the LAZ CTs prior to shipping them to ComEd. ComEd Ex. 1.0 at 14. In addition, the LAZ CTs were part of a shipment that ComEd tested through its sampling procedure. *Id.* at 14; ComEd Ex. 1.08. Mr. Rumsey testified that ComEd would not have accepted this shipment otherwise. *Id.* ComEd Init. Br. at 15-16.

## **B. The Requisite Post-Installation Inspection**

### **LAZ's Position**

[Potentially corresponds to LAZ Init. Br. § IV.A.]

### **ComEd's Position**

ComEd stated that it is undisputed that ComEd has a pattern and practice of conducting post-installation inspections “[w]ithin 90 days after installation or exchange of any meter with associated instrument transformers.” 83 Ill. Admin. Code § 410.155; ComEd Ex. 1.0 at 8. Mr. Rumsey explained that in conducting these inspections, ComEd dispatches a F&MS technician to the customer location. Tr. at 379-380 (Rumsey); ComEd Ex. 1.0 at 8-9. The F&MS technician fills out an “Aux Inspection Form,” which includes information about CT model type and size, checks to make sure that the current and voltage wiring from the affiliated equipment to the meter fitting is correct, and that electricity is flowing forward. ComEd Ex. 1.0 at 9; ComEd Ex. 1.03; Tr. at 365 (Rumsey). The technician then enters information from the Aux Inspection Form into his MDT. Tr. at 369 (Rumsey). This information is then transferred to a F&MS clerk who inputs the data into CIMS. *Id.* ComEd argued that LAZ’s own expert indicates that this is an appropriate method of conducting post-installation inspections. *Id.* at 316; LAZ Ex. 3.1 at 2 (stating “CURRENT TRANSFORMERS CAN BE VISUALLY CONFIRMED USING THE NAMEPLATE DATA”). ComEd Init. Br. at 16.

ComEd’s records show that it installed the LAZ Meter on December 14, 2007. ComEd Ex. 1.0 at 14. As ComEd noted, it was not able to locate the Aux Inspection Form or any other documents or information related to the installation or post-installation inspection of the LAZ Meter. *Id.* at 15; Tr. at 385-387 (Rumsey). ComEd argued that this is not, however, proof by a preponderance of the evidence that ComEd acted contrary to its pattern and practice of conducting post-installation inspections with regard to the LAZ Meter. See 5 ILCS 100/10-15 (standard of proof in contested case is preponderance of the evidence). ComEd Init. Br. at 16-17.

ComEd explained that with regard to installation information, Commission Regulations require that ComEd retain only the date and location of installation. 83 Ill. Admin. Code §§ 410.110(a)(4); 420, Appendix A ¶59(m). As long as ComEd maintains that information, the Commission Regulations do not require that ComEd retain any installation documentation. *Id.* And, as ComEd further explained, because ComEd installed the LAZ Meter on December 14, 2007, even if the three-year retention period commonly imposed for other types of meter and associated equipment records is applied here, ComEd was not required or even likely to retain any records of the LAZ Meter installation and post-installation inspection beyond mid-March of 2011. 83 Ill. Admin. Code § 410.110. Section 410.110 of the Commission Regulations deals with “service watt-hour meters” and “var-hour meters.” ComEd asserted that at the evidentiary hearing in this docket, the ALJ asked ComEd witness Mr. Rumsey whether a watt-hour meter is a recorder meter and whether a var-hour meter is a recorder meter. Tr. at 393. Mr. Rumsey responded that they are not recorder meters. *Id.* The converse, however, is

true: a recorder meter can be considered a special type of “service watt-hour meter” as that term is defined in the Commission Regulations. ComEd Init. Br. at 17.

## **1. Burden of Proof**

### **LAZ’s Position**

[Potentially corresponds to LAZ Init. Br. § IV.A.]

### **ComEd’s Position**

In reply, ComEd noted that LAZ claims there is a presumption that ComEd did not perform a post-installation inspection. LAZ Init. Br. at 8-9. ComEd argued that LAZ mischaracterizes the case law in this regard. As the Complainant, LAZ has the burden of proof in this case. *Beery v. Breed*, 311 Ill. App. 469, 475 (2d Dist. 1941) (cited by LAZ). This means that LAZ must prove all elements of its claim by a preponderance of evidence. 5 ILCS 100/10-15 (standard of proof is preponderance of evidence). “There is no presumption against a defendant ... when the plaintiff, carrying the burden of proof, has not made a prima facie case, and such presumption cannot be used to relieve the plaintiff from the burden of proving his case.” *Beery*, 311 Ill. App. at 475. LAZ has not met its burden to prove either that there was meter error in this case or that ComEd failed to perform a post-installation inspection. ComEd Reply Br. at 14.

ComEd further argued that even if LAZ had met this burden, in order to obtain a presumption, LAZ would have been required to make a foundational showing that, among other things, ComEd could have produced evidence of a post-installation inspection *and* that ComEd’s excuse for failing to produce that evidence was not reasonable. *Roesseke v. Pryor*, 152 Ill. App. 3d 771, 781 (1st Dist. 1987); *DeBow v. City of East St. Louis*, 158 Ill. App. 3d 27, 36 (5th Dist. 1987) (both cited by LAZ). ComEd contended that LAZ did not make this showing. To the contrary, ComEd adequately explained the fact that it could not locate records related to the post-installation inspection in this case *and* why it could not locate those records. ComEd Init. Br. at 16-17; ComEd Ex. 1.0 at 15; Tr. at 385-387 (Rumsey). ComEd stated that LAZ attempts to further muddy the waters by insinuating that ComEd’s installation and inspection records are the same as ComEd’s meter test records. LAZ Init. Br. at 8-12. ComEd has explained *ad nauseum* that this is incorrect. See, e.g., ComEd Init. Br. at 9-11, 15-19. The Commission Regulations regarding record retention recognize this distinction as well. *Id.* at 17. ComEd Reply Br. at 14-15.

## **2. The Additional Testing that LAZ Recommends**

### **LAZ’s Position**

[Potentially corresponds to LAZ Init. Br. §§ IV.B.-F. and LAZ Reply Br. § I.C.-E.]

### **ComEd’s Position**

ComEd contended that in an attempt to make ComEd's compliance with the Commission Regulations appear inadequate, LAZ puts forth three arguments: (1) that ComEd was required to perform a post-installation test; (2) that in performing that test ComEd should have used a method specified by LAZ's expert witness, Mr. Richard B. Bernhardt; and (3) that this testing would have revealed the error in this case. According to ComEd, LAZ is incorrect on all three points. ComEd Init. Br. at 17.

**a) The Commission Regulations Require a Post-Installation Inspection, Not a Post-Installation Test**

ComEd stated that in some places, the Commission Regulations use the term "test." See, e.g., 83 Ill. Admin. Code § 410.150. In other places, the Commission Regulations use the term "inspection." See, e.g., 83 Ill. Admin. Code § 410.155. And in still other places the Commission Regulations use both terms, i.e., "inspected and tested." See, e.g., 83 Ill. Admin. Code § 410.160. LAZ treats these separate and distinct terms as having the same meaning in every instance. ComEd argued that LAZ is incorrect. ComEd Reply Br. at 9.

ComEd further argued that "[t]he fundamental rule of statutory construction is to give effect to the intent of the legislature." *City of Chicago v. Old Colony Partners, L.P.*, 364 Ill. App. 3d 806, 813 (1st Dist. 2006). "Giving the statutory language its plain meaning is the best means of ascertaining legislative intent." *Id.* "In doing so, each word, clause or sentence should be given its reasonable meaning and not be discarded as superfluous." *Id.* "Words and phrases should not be construed in isolation, but interpreted in light of other relevant portions of the statute so that, if possible, no term is rendered superfluous or meaningless." *Land v. Board of Educ. of City of Chicago*, 202 Ill. 2d 414, 422 (2002). See also *Springfield Sch. Dist. No. 186 v. Dep't of Revenue*, 384 Ill. App. 3d 715, 720 (4th Dist. 2008) (same). Moreover, it is "well established that, by employing certain language in one instance, and entirely different language in another, the legislature indicated that different results were intended." *People v. Ousley*, 235 Ill. 2d 299, 313-314 (2009). ComEd Reply Br. at 9.

ComEd asserted that the plain language of the Commission Regulations requires a post-installation *inspection*, not a *test*. 83 Ill. Admin. Code § 410.155. ComEd explained that in addition, the Commission has specific limitations on how often ComEd should be required to test meters – no more than once every 6 to 12 months. See, e.g., 83 Ill. Admin. Code §§ 410.190, 410.195. According to ComEd, requiring back-to-back pre and post installation testing would conflict with these Commission Regulations. Moreover, as ComEd argued, if ComEd has just tested the meter pre-installation, it would be a waste of time and money to immediately test the meter again post-installation. ComEd Ex. 1.0 at 9. ComEd further stated that to be clear: no testing is required and no testing occurs during the post-installation inspection. ComEd Ex. 5.0 at 1-2. ComEd Init. Br. at 17-18.

As ComEd noted, the Commission itself has rejected a similar interpretation of these Commission Regulations, with the Commission's Office of General Counsel ("OGC") stating that the argument involves:

constructions of the Commission rules which are not supported by any evidence and are contrary to the plain language of the rule. Amcor cites 83 Ill. Adm. Code 410.155, which requires a “post-installation inspection under load,” and then argues that ComEd failed to perform “post-installation testing” (Brief, pp. 32 and 39). **83 Ill. Adm. Code 410.155 plainly does not require the testing established within 83 Ill. Adm. Code 410.200(h)(1). The Commission correctly rejected Amcor’s unsupported argument.** See Order, pp. 17-19 (ComEd’s response) and p. 26, 3<sup>rd</sup> Ordering ¶¶, R. Vol. 5, C-01218–C-01220 and C-01227; ALJ’s memo, *Id.*, C-01170 and C-01198. See also \*A-32; A-37; *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 479 (1994) [it is improper to depart from the plain language in construing statutes].

Despite Amcor’s contentions, the Commission, the author of the rules, has properly applied its rules to the present situation. The Commission’s Order of April 2, 2014 should be affirmed as will be explained below in this Brief. R. Vol. 5, C001202–C-01228.

*Amcor v. ICC and ComEd*, Appellate Court Docket No. 1-15-2985, Brief of Respondent ICC (March 8, 2016) (“OGC Brief”) at 40-41 (emphasis added). According to ComEd, the Commission should similarly reject LAZ’s argument here. ComEd Init. Br. at 18.

ComEd stated that although LAZ’s own witness on this topic initially claimed that there is no distinction between a meter test and a post-installation inspection, Mr. Bernhardt later admitted that he has no knowledge or experience regarding meters in Illinois or meters regulated by the Commission. Tr. at 310 (Bernhardt). ComEd argued that further, he agreed that the Commission Regulations clearly distinguish between testing and inspection in this context. *Id.* at 308-309. Otherwise the use of the terms “inspected and tested” together would render one of those terms mere surplusage:

BY MS. BARRETT:

Q So in this case, I’d like to take a look at how the Commission has made a distinction between these two terms in its regulations. So let’s look at part 410 again.

And we can start with Section 410.150. And that’s Meter Accuracy Requirements and that talks about testing in relation to meter accuracy requirements, correct?

A I’m catching up to you. Yes.

Q And it does not talk about inspection in relation to those accuracy requirements, correct? And I am not talking about what your knowledge from the industry is. I am talking about the Commission regulations.

A Those word [sic] are not used, correct.

Q And now let's look at 410.155.

And that is titled Installation Inspections, correct?

A Yes.

Q And it talks about post-installation inspection. It does not talk about testing, correct? The language of the regulation.

A Correct.

Q And now let's move to 410.160. That Section is title Initial Tests, correct?

A Yes.

Q And if you read that, it actually talks about inspection and testing doesn't it?

A Yes.

Q So this section is contemplating inspection and testing being two different things, right?

A I don't know the writer's mind.

Q So if it wasn't contemplating two different things, it would be like – it would be like saying testing and testing?

A Yes.

Tr. at 308-309 (Bernhardt). ComEd Reply Br. at 10-11.

ComEd stated that LAZ's tortured interpretation of the Commission Regulations – by an expert with no experience in Illinois – extends to other topics as well, including what qualifies as “standards” pursuant to the Commission Regulations. See, e.g., Tr. at 242-246, 285-289, 337-339 (Bernhardt). ComEd further asserted that Mr. Bernhardt also seems to be laboring under the misapprehension that ComEd has test meters that can handle the level of current that a customer like LAZ uses *without* a CT stepping down that current. *Id.* at 285; 326-329. According to Mr. Rumsey, if this were true, ComEd would not need to utilize CTs in the first place. See ComEd Ex. 1.0 at 7. ComEd Init. Br. at 18-19.

In reply, ComEd noted that LAZ's citation to unrelated amendments to section 410.180, governing Sample Testing Procedures, is inapplicable to the question of whether the Commission's use of the word inspection in section 410.155, governing Installation Inspections, is equivalent to if the Commission had used the word test. See LAZ Init. Br. at 16. Similarly, as ComEd explained, LAZ's attempt to equate ComEd's movement from individually testing every commercial meter to sample testing those meters – in order to meet the requirements for pre-installation testing in section 410.160, Initial Tests – as some sort of an admission that inspection and testing are the same is unavailing. LAZ Init. Br. at 16. ComEd Reply Br. at 11.

ComEd also stated that LAZ asserts that sample testing is “appropriate for residential, small commercial, and other self-contained metering installations, but not for metering installations associated with instrument transformers, such as this case involves.” LAZ Init. Br. at 16. ComEd argued that the Commission Regulations contain no such prohibition. The Commission Regulations provide the sampling procedures that must be used for sample testing “non-demand, self-contained single phase or three-wire network meters,” but they do not prohibit utilities from using those sampling procedures for sample testing other categories of meters, nor do they prohibit sample testing other types of meters in general. *Compare* 410.180(a) (specifically limited to certain types of meters) *with* 410.180 (b)-(h) (not limited to those types of meters); *and* 410.110(a)(1) (contemplating “testing data provided by the manufacturer that is used by the entity for acceptance testing of the meter” and not limited to the meter types specified in 410.180(a)); *and* 410.160 (contemplating testing at locations other than the meter shop of the utility). ComEd Reply Br. at 11, fn 2.

ComEd clarified that no testing is required and no testing occurs during the post-installation inspection. ComEd Ex. 5.0 at 1-2. ComEd has never done or said anything to the contrary. In any event, ComEd has explained that a post-installation test would not have revealed the constant error in this case. ComEd Init. Br. at 20-22. ComEd Reply Br. at 11.

**b) The Testing that LAZ Recommends Does Not Meet the Part 410 Accuracy Requirements**

ComEd contended that as a preliminary matter, LAZ has played a shell game with ComEd and the Commission, changing and refining the description of the testing it purports to recommend each time ComEd points out a flaw in LAZ's position. *Compare* ComEd Cross Ex. 2, Affidavit of Richard B. Bernhardt, ¶ 16 (during testing, meter is isolated from CTs, so that it may be tested while in service without hazard to utility personnel) *with* Tr. at 255-260 (Bernhardt) (meter only isolated in *some* tests and sometimes only while connection is made, then “deisolate[d]”); *compare* LAZ Ex. 2.0 at 11-12 (discussing “field test” in direct testimony as “under load, meaning in actual use, at the customer's service location ... so that certain controlled load test points are examined, namely light load and full load.”) *with* LAZ Ex. 3.0 at 8 (discussing test in surrebuttal testimony “under actual customer load”) *and* Tr. at 266-267 (Bernhardt) (admitting the only way to test these load points is using a *test load*, not the customer's *actual load*, and therefore the testing he recommends in surrebuttal – using customer's *actual load* – is

different from what he recommends in direct). See also LAZ Ex. 3.0 at 1: and Tr. at 319-333 (Bernhardt) (depicting several testing methods that may or may not have been discussed in testimony); LAZ Ex. 3.0 at 3-4 and Tr. at 274 (Bernhardt) (conflating testing procedures and billing procedures). ComEd Init. Br. at 19.

ComEd stated that in any event, the final iteration of the post-installation testing LAZ would have ComEd perform – assuming a post-installation test was required, and it was not – does not meet the meter accuracy requirements in the Commission Regulations. As argued by ComEd, LAZ ultimately admitted that using the customer's own load as it recommends, it is impossible to utilize the light load, heavy load, and power factor criteria that the Commission Regulations require. Compare 83 Ill. Admin. Code § 410.150(a)(1)-(3) with Tr. at 266-267 (Bernhardt). Consequently, according to ComEd, under LAZ's test, it would be impossible to determine if the meter is accurate as defined by the Commission Regulations. See 83 Ill. Admin. Code § 410.150. Likewise, as ComEd further asserted, it would be impossible to determine if the meter is experiencing meter error as defined by the Commission Regulations. See 83 Ill. Admin. Code § 410.200. ComEd Init. Br. at 20.

Therefore ComEd argued, for an entity regulated by the Commission, the test that LAZ recommends is a meaningless exercise. Furthermore as ComEd asserted, if ComEd were to expend funds on this type of testing, it could be deemed an imprudent and unreasonable course of action leading to disallowance of cost recovery. 220 ILCS 5/1-102(a)(iv) (utilities can recover only those costs "prudently and reasonably incurred"). According to ComEd, LAZ's position is therefore inexplicable, particularly given the fact that LAZ's own expert lists using a test load as an appropriate test method. Tr. at 334-335 (Bernhardt); LAZ Ex. 3.1. ComEd Init. Br. at 20.

**c) The Testing that LAZ Recommends Would Not Reveal the Use of the Incorrect Constant**

ComEd contended that even without reference to the requirements set forth in the Commission Regulations, the test that LAZ recommends is an exercise in futility. Under either the test that ComEd performs pursuant to the Commission Regulations or the test that LAZ recommends, ComEd stated that it is undisputed that, "for a given period of time, the same exact current, voltage and phase angle pass through both the portable standard and the revenue billing meter under test." LAZ Ex. 2.0 at 14; ComEd Ex. 5.0 at 8-9. As Mr. Rumsey explained in his rebuttal testimony, the portable standard or the entity performing the test then compares the electricity that flowed through the standard during this test to the electricity that flowed through the meter at issue. ComEd Ex. 5.0 at 4. That comparison provides the percentage of accuracy of the meter at issue. *Id.* ComEd argued that this provides an apples to apples comparison because the same electricity flowed through both the portable standard and the meter. *Id.*; Tr. at 279-282 (Bernhardt). ComEd Init. Br. at 20-21.

As ComEd explained, for the type of test that the Commission Regulations require – utilizing a test load – LAZ's expert agrees that factoring in billing multipliers, *i.e.*, the constant at issue in this case, is irrelevant and unnecessary. Tr. at 284 (Bernhardt).

Doing so is simply an exercise in multiplication, *i.e.*, multiplying the result for the portable standard by 600 and multiplying the result for the meter under test by 600. *Id.* Thus, as ComEd explained, the test that the Commission Regulations require would never reveal the constant error in this case. *But cf.* LAZ Ex. 3.0 at 5 (claiming that the TESCO portable meter test standard would have instantly identified an error related to a CT) *with* Tr. at 278-279, 264 (Bernhardt) (admitting that a meter test with a portable standard that is isolated cannot instantly identify an error related to a CT). ComEd Init. Br. at 21.

ComEd further explained that LAZ maintains that the test it recommends – using the customer’s own load – would reveal the error. ComEd contended that what LAZ fails to understand is that even if the entity testing the meter uses the customer’s own load, factoring in the constant is similarly irrelevant and unnecessary. This is still simply an exercise in multiplication, as the testing entity would undoubtedly apply the same constant to the results from both the portable standard and the meter under test. Tr. at 283-284 (Bernhardt); Tr. at 368, 373 (Rumsey). ComEd Init. Br. at 21.

According to ComEd, it appears however, that LAZ is assuming that the testing entity would obtain two different constants from two different sources, *e.g.*, from the equipment under test and from CIMS. But if this is the case, ComEd stated that there is no need to perform any of the equipment testing that LAZ recommends. The testing entity could simply compare the constant information shown on the equipment and the constant information in CIMS to determine if there is a constant error. As Ms. Spitz testified, this is, of course, precisely what ComEd’s Constant Report does and is exactly how ComEd discovered the constant error in this case. ComEd Ex. 3.0 at 3-4. ComEd Init. Br. at 22.

### **3. LAZ Attempts to Institute a Rulemaking under the Guise of a Contested Case**

#### **LAZ’s Position**

[Potentially corresponds to LAZ Init. Br. § V and LAZ Reply Br. § I.F.]

#### **ComEd’s Position**

In reply, ComEd explained that the Commission has the power to hear several different kinds of cases, including contested cases and rulemakings. “‘Contested case’ means an adjudicatory proceeding (not including ratemaking, rulemaking, or quasi-legislative, informational, or similar proceedings) in which the individual legal rights, duties, or privileges of a party are required by law to be determined by an agency only after an opportunity for a hearing.” 5 ILCS 100/1-30. “‘Rulemaking’ means the process and required documentation for the adoption of Illinois Administrative Code text.” 5 ILCS 100/1-90. It is undisputed that the instant docket is a contested case, not a rulemaking. Complaint at 1 (bringing case under 83 Ill. Admin. Code § 200.170, Formal Complaints, not 83 Ill. Admin. Code § 200.210, Petition for Rulemakings); 83 Ill. Admin. § 200.40 (complaint cases are contested cases). ComEd Reply Br. at 15.

ComEd argued that in this contested case, LAZ seeks to substitute its method of testing “meter installations” for the method that ComEd uses to test meters. See, e.g., LAZ Init. Br. at 12, 18-20. ComEd did not dispute that portions of its tariffs refer to “meter installations.” See LAZ Init. Br. at 17-18, fn 4. ComEd argued that is not, however, relevant to the issues presented here. The relevant Commission Regulations in Part 410 clearly refer to meters as opposed to the broader phrase “meter installations” and the even broader definition that LAZ sometimes uses that would encompass ComEd’s separate billing system. See *generally* 83 Ill. Admin Code Part 410. Cf. 83 Ill. Admin Code § 410.190(a) and § 410.195(a) (referencing “meter installation locations” only with regard to where meter tests requested by the customer and the entity, respectively, shall be performed); and 83 Ill. Admin Code § 410.155 (discussing inspection of meter that has associated equipment, not testing of associated equipment). ComEd Reply Br. at 15, and fn. 3.

ComEd stated that LAZ’s substitution of testing methods is problematic for two reasons. First, Part 410 tells ComEd what it must do in terms of meter testing and accuracy. As ComEd has shown, the tests LAZ recommends do not comply with the standards set forth in Part 410. ComEd Init. Br. at 19-20. Second, the Commission audits ComEd’s “meter testing equipment and methods at least every 3 years.” 83 Ill. Admin. Code § 410.140(e). Thus, the Commission knows and approves of what ComEd is doing in order to comply with the Commission’s meter testing policies and procedures as expressed in the Commission Regulations. ComEd argued that it is not up to LAZ to change those requirements or expectations in the context of a contested case. As LAZ clearly states: “Adopting LAZ Parking’s position likely means that ComEd will reform its meter testing procedures ... .” LAZ Init. Br. at 20. This is an issue for a rulemaking; it is not something the Commission should address in the context of a contested case. ComEd Reply Br. at 15-16.

Moreover, ComEd noted that LAZ claims it would only take a “few minutes” to run the tests that LAZ recommends. LAZ Init. Br. at 14, 20. LAZ further claims that these test are “relatively easy” and “speedy.” *Id.* at 19. ComEd stated that LAZ has no cost analysis or other evidence to support this claim. ComEd further stated that LAZ certainly has not shown that its “modification or exemption” from the Commission Regulations “is economically and technically sound” as required by the Commission Regulations. 83 Ill. Admin. Code § 410.30. This “few minutes” estimate certainly cannot account for travel time, fuel costs, dispatch and coordination time, or any other associated activities or costs. ComEd Reply Br. at 16.

Although LAZ paints ComEd’s meter testing and post-installation inspection procedures as the product of a callous and indifferent business decision on the part of ComEd, ComEd contended that is simply not accurate. LAZ Init. Br. at 14. ComEd stated that it complied with the Commission Regulations. ComEd Init. Br. at 15-17. This is one instance out of many – undoubtedly hundreds of thousands of meter installations – where a constant error occurred despite the implementation of the Commission and ComEd’s sound policies and procedures. The Commission could certainly craft regulations that require more aggressive, perhaps even redundant, testing and accuracy requirements,

or even prerequisites to issuing adjustments for billing errors as opposed to meter errors. But that is not what the operative Commission Regulations call for. As explained in ComEd's Initial Brief, the operative Commission Regulations prescribe specific testing and accuracy requirements and contemplate that pursuant to those requirements, some errors will still occur. ComEd Init. Br. at 2, 11. The Commission also recognizes that not all errors are meter errors. Some errors are billing errors. ComEd Init. Br. at 7-13. ComEd Reply Br. at 16-17.

Finally, contrary to LAZ's claims, ComEd clarified that it has not said that all post-installation field tests are unfeasible or impractical. *Cf.* LAZ Init. Br. at 10-11. Indeed, the evidence shows that ComEd has equipment similar to that espoused by Mr. Bernhardt and that ComEd utilizes such equipment for efficient and effective field testing when such testing is appropriate. ComEd Ex. 5.0 at 6. ComEd explained that the point that LAZ fails to understand is that there is always the possibility of human error, particularly when data entry is involved. In this case, for example, the constant information could have been entered incorrectly into CIMS after either the installation or following the post-installation inspection. Tr. at 374-376 (Rumsey) (discussing the two different data points involved in entering current transformer ("CT") information into Mobile Dispatch Terminals and CIMS). Indeed, this is why sections 280.100 and 410.200(h)(1) and (f) exist, because the Commission knows that despite best efforts, mistakes leading to billing or meter errors will happen. ComEd Init. Br. at 2, 11. ComEd Reply Br. at 17.

## **V. FACTUAL DISPUTES**

### **A. The Actual Dollar Value of the Unbilled Service**

#### **LAZ's Position**

[Potentially corresponds to LAZ Init. Br. § II.A.]

#### **ComEd's Position**

ComEd argued that if the error in this case is deemed a meter error *and* the Commission finds that a preponderance of the evidence shows that ComEd did not meet the Part 410 testing and accuracy requirements, then the Commission must determine the dollar value of the unbilled delivery service provided between June 3, 2008 and May 3, 2010. ComEd stated that the evidence in this proceeding shows that this amount is \$180,943.15. ComEd Ex. 4.0 at 1:-2. According to ComEd, that is the only amount remotely related to any type of ComEd error. *Id.* ComEd Init. Br. at 22.

ComEd stated that despite LAZ's insinuations to the contrary, the \$36,625.07 in charges in the September 20, 2010 Disconnection Notice ("Disconnection Notice") was related to unpaid service provided by ComEd between May 5, 2010 and September 1, 2010 – after ComEd resolved the constant issue – and was not related to any type of ComEd error. ComEd reiterated: the \$36,625.07 in charges in the Disconnection Notice had nothing to do with the two years of unbilled service (due to the incorrect constant)

provided between June 3, 2008 and May 3, 2010. ComEd Ex. 4.0 at 2. ComEd Init. Br. at 22.

### **1. The Unbilled Service**

ComEd provided detailed testimony and exhibits showing that the total value of the delivery service provided to LAZ between June 3, 2008 and May 3, 2010 was \$225,484.52. ComEd Ex. 4.0 at 4; ComEd Ex. 4.03 at CCLP 0000009-11; ComEd Ex. 4.04. In that time frame, using the incorrect constant, ComEd billed LAZ – and LAZ correspondingly paid – for \$44,541.37 in delivery service. As ComEd explained, this means that LAZ had \$180,943.15 in unbilled delivery service charges (\$225,484.52 total value minus \$44,541.37 previously billed). ComEd Ex. 4.0 at 4. ComEd Init. Br. at 22-23.

Ms. Jamison testified that when ComEd discovered the error, ComEd cancelled the incorrect bills totaling \$44,541.37 for the June 3, 2008 to May 3, 2010 time period. ComEd Ex. 4.0 at 5; ComEd Ex. 3.0 at 6; ComEd Ex. 4.03 at CCLP 0000006-8. ComEd then rebilled the full amount of the \$225,484.52 for the same time period. See ComEd Ex. 4.03 at CCLP 0000009-11. ComEd Ex. 4.0 at 5. The rebill encompassed two additional days, May 4 and 5, because it was keyed to the actual meter read date of May 5. *Id.* As Ms. Jamison further explained, cancelling the incorrect bills caused CIMS to issue a credit in the amount of \$44,541.37, because LAZ had already paid those bills. *Id.*; ComEd Ex. 4.03 at CCLP 0000009. Thus, ComEd stated that ComEd charged LAZ – and LAZ paid – \$180,943.15 for unbilled delivery service between June 3, 2008 and May 3, 2010. ComEd Ex. 4.0 at 5. ComEd Init. Br. at 23.

In reply, ComEd noted that LAZ claims, without citation to any authority, that the “total amount directly or indirectly paid by LAZ Parking to ComEd for alleged unbilled delivery services charges is \$259,937.85.” LAZ Init. Br. at 4. According to ComEd, this is false. The evidence shows that the actual amount “directly or indirectly paid by LAZ parking for alleged unbilled delivery services charges” is \$180,943.15. ComEd Init. Br. at 22-23; ComEd Ex. 4.0 at 1-2, 4; ComEd Ex. 4.03 at CCLP 0000009-11; ComEd Ex. 4.04. ComEd Reply Br. at 19.

### **2. The Disconnection Notice**

ComEd explained that the \$36,625.07 at issue in the Disconnection Notice related to delivery service provided by ComEd to LAZ in a later time frame: between May 5, 2010 and September 1, 2010. ComEd Ex. 4.0 at 5; ComEd Ex. 4.05. Accordingly to ComEd, contrary to LAZ’s claims, LAZ was billed for this delivery service between July 9, 2010 and September 1, 2010, within two years after the delivery service was provided. ComEd Ex. 4.0 at 5. Specifically, the Disconnection Notice concerned four months of delivery service charges that total \$36,143.30; five late fees that total \$1,196.83; and a credit in the exact amount of those late fees, that results in total charges and a corresponding payment amount by LAZ of \$36,143.30. ComEd Ex. 4.0 at 6; ComEd Ex. 4.03 at CCLP 0000011-12; ComEd Ex. 4.06. ComEd Init. Br. at 23.

As ComEd explained, the sum of the delivery service charges and the late fees, \$37,340.13, is slightly higher than the \$36,625.07 reflected in the Disconnection Notice, because LAZ incurred two late fees totaling \$715.06 on September 20 and 21, 2010, after ComEd issued the Disconnection Notice. ComEd Ex. 4.0 at 6. ComEd credited the amount of all late fees so this did not impact the amount that LAZ eventually paid. *Id.* Furthermore, as ComEd stated, none of the charges related in any way to the constant error or the unbilled service provided prior to May 2010. ComEd Init. Br. at 24.

ComEd stated that after ComEd resolved the incorrect constant in CIMS, LAZ failed to pay its bills for the next four months. After ComEd issued the Disconnection Notice, ComEd and LAZ communicated about the delivery service charges and late fees. LAZ Ex. 1.0 at 7. This resulted in ComEd providing a credit for the full amount of the late fees and LAZ providing payment for the delivery service charges. *Id.* ComEd asserted that none of this has anything to do with the ComEd error at issue in this case. ComEd Init. Br. at 24.

## **B. Dispatch of ComEd Witness Mr. Derrick Moore to the LAZ Facility**

### **LAZ's Position**

[Potentially corresponds to LAZ Init. Br. § IV.E.]

### **ComEd's Position**

In reply, ComEd noted that LAZ claims that Mr. Moore testified that Ms. Spitz dispatched him to the LAZ Facility after Ms. Spitz reviewed the Meter Constant Discrepancy Report ("Constant Report"). LAZ Init. Br. at 13. ComEd argued that this is not accurate. Mr. Moore was dispatched on April 6, 2010. ComEd Ex. 2.0 at 1. Subsequently, Ms. Spitz first learned of the constant error on April 23, 2010. ComEd Ex. 3.0 at 4. In fact, as ComEd explained in its Initial Brief, it is possible that Mr. Moore's visit to the LAZ Facility on April 6, 2010 is what caused the LAZ Meter to show up on the April 23, 2010 Constant Report that brought this issue to Ms. Spitz's attention. ComEd Init. Br. at 4-5. In any event, Ms. Spitz never dispatched Mr. Moore anywhere. ComEd Reply Br. at 17-18.

## **C. Ms. Spitz's Testimony**

### **LAZ's Position**

[Potentially corresponds to LAZ Init. Br. § IV.E.]

### **ComEd's Position**

In reply, ComEd observed that LAZ states: "ComEd witness Spitz testified that the reason ComEd pays attention to these meter discrepancy reports and sends technicians out for meter verifications is that a 'large dollar value' may be associated with a discrepancy that involves a transformer-rated meter." LAZ Init. Br. at 13. ComEd argued

that this is a gross mischaracterization of Ms. Spitz's testimony and apparently part of LAZ's strategy to cast ComEd as "indifferent." See, e.g., LAZ Init. Br. at 19, 20. ComEd Reply Br. at 18.

ComEd stated that Ms. Spitz testified that after reviewing the Constant Report, she "obtained and reviewed a CIMS Meter Reading history for the LAZ meter" and "also requested that ComEd's Field & Meter Services ('F&MS') department perform a re-verification of the meter number and the size and type of the CT." ComEd Ex. 3.0 at 5. Ms. Spitz further testified that she did this because: "[w]henver it appeared to me that there could be a large dollar value associated with a constant discrepancy, it was my pattern and practice to request a re-verification in order to confirm that the equipment information in CIMS was correct." *Id.* at 5. ComEd Reply Br. at 18.

In other words, because it appeared to her that a large dollar value could be associated with this constant error, she was unwilling to re-bill the customer based solely on the Constant Report until she re-verified the details of the equipment at issue. This testimony does not in any way imply that ComEd only reviews Constant Reports because "a 'large dollar value' may be associated with a discrepancy." LAZ Init. Br. at 13. This testimony does show, however, that far from being indifferent, Ms. Spitz was exceedingly interested, careful, and cautious in executing her job duties. ComEd Reply Br. at 18-19.

#### **D. Installation of the LAZ Meter**

##### **LAZ's Position**

[Potentially corresponds to LAZ Init. Br. §§ II.A. and II.C.3.]

##### **ComEd's Position**

In reply, ComEd observed that LAZ claims that "correspondence from ComEd dated October 28, 2010, a copy of which is attached as Exhibit A to this Brief, states that ComEd installed the meter with an incorrect meter constant." LAZ Init. Br. at 4. LAZ's Exhibit A says nothing of the sort. In fact, that document states that LAZ was "billed for electricity recorded on meter 141362866 located at 25 N. Michigan, Chicago, IL, with an incorrect meter constant that resulted in your being billed for less electricity than you actually used. We have identified the reason for this situation and it has been corrected." Ex. A to LAZ Init. Br. ComEd stated that this document does not indicate in any way that ComEd "installed the meter with an incorrect constant." Moreover, the evidence shows that ComEd does not install meters with constants; ComEd enters the constant into CIMS, separate and apart from the meter. ComEd Ex. 1.0 at 8, 13, 2; ComEd Ex. 3.0 at 3. ComEd Reply Br. at 19.

#### **E. Qualifications of ComEd Witness Mr. Rumsey**

##### **LAZ's Position**

[Potentially corresponds to LAZ Init. Br. § IV.D.]

### **ComEd's Position**

In reply, ComEd took issue with LAZ's disparagement of Mr. Rumsey's opinion "on what a post-installation inspection at a customer's service location would disclose" because "during all his years with ComEd he never field-tested a meter, nor did he ever field-test or 'inspect' a CT at a customer service location." LAZ Init. Br. at 12. To set the record straight: the evidence shows that over the course of his career Mr. Rumsey tested over 60,000 meters in Illinois, pursuant to the standards set forth in the Commission Regulations. Tr. at 350 (Rumsey). To the contrary, ComEd explained that the evidence does not show how many meters Mr. Bernhardt tested, or if he ever tested a single meter. See, e.g., LAZ Ex. 2.0 at 2-5; Ex. A to LAZ Response to ComEd Motion for Summary Judgment (Sept. 25, 2015). It certainly does not show whether *he* ever field-tested a meter, nor is there any evidence that *he* ever field-tested or inspected a CT at a customer service location. Cf. LAZ Init. Br. at 12. Moreover, ComEd stated that Mr. Bernhardt admitted that he has no knowledge or experience regarding meters in Illinois or meters regulated by the Commission. Tr. at 310 (Bernhardt). According to ComEd, LAZ's criticism is misplaced. ComEd Reply Br. at 20.

### **F. ComEd's Meter Constant Discrepancy Report**

#### **LAZ's Position**

[Potentially corresponds to LAZ Init. Br. § IV.E.]

#### **ComEd's Position**

In reply, ComEd stated that LAZ claims that ComEd's "Meter Testing Procedures Are Deficient and Cause Unnecessary Waste for Both the Customer, ComEd and the Commission." LAZ Init. Br. at 13. ComEd argued that LAZ bases this claim on several factual errors, as well as its understanding that ComEd's Constant Report is part of ComEd's "approach to satisfying the Commission's testing and accuracy requirements applicable to transformer rated meters." *Id.* ComEd stated that LAZ then makes the unsupported statement that this Constant Report involves a "profligate waste of money, time and effort." *Id.* ComEd Reply Br. at 20.

ComEd contended that first, the evidence shows that the Constant Report is not part of ComEd's meter testing procedures; it is a function of the billing department. It is generated by the billing department, using information contained in the CIMS billing software, and it is reviewed by billing department employees. ComEd Ex. 3.0 at 4. The Constant Report is simply not related to ComEd's meter testing policies and procedures. Second, ComEd stated there is no evidence in the record of the incremental cost to ComEd to generate and review the Constant Report. There is certainly no evidence to show that it involves a "profligate waste of money, time and effort." ComEd Reply Br. at 21.

## VI. THE FEBRUARY 13, 2014 “ADMISSIONS”

### LAZ's Position

[Potentially corresponds to LAZ Init. Br. §§ II.B.-D. and LAZ Reply Br. §§ II.A.-C.]

### ComEd's Position

ComEd reiterated and incorporated by reference its prior arguments that formal discovery is discouraged at the Commission and that the February 13, 2013 Admissions (“Admissions”) should not have been deemed admitted. 83 Ill. Admin. Code § 200.340; ComEd Response in Opposition to LAZ Parking's Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto (Dec. 17, 2012) at 2-11; ComEd's Response to LAZ Parking's Motion to Strike Portions of ComEd's Motion for Summary Judgment and Supporting Affidavits and to Strike the Schedule For Same (July 24, 2015) at 13. ComEd Init. Br. at 24-25.

ComEd stated that it provided timely objections and in some cases paired those objections with fulsome responses. ComEd Motion for Summary Judgment (June 30, 2015), Appendix at 14-18; ComEd Response in Opposition to LAZ Parking's Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto (Dec. 17, 2012) at 7; ComEd's Response to LAZ Parking's Motion to Strike Portions of ComEd's Motion for Summary Judgment and Supporting Affidavits and to Strike the Schedule For Same (July 24, 2015) at 7-8, and fn4. ComEd argued that this is not a forum where requests for admission are routinely utilized and this is not a situation where the party responding to the requests for admission was evasive or non-responsive in those responses. ComEd Init. Br. at 25.

### **1. Rule 216 Requirements**

LAZ has argued that ComEd's failure to provide a sworn statement with its responses and objections to LAZ's Requests for Admission was fatal. ComEd argued that the merits of LAZ's argument are flawed. The text of the rule itself clearly only requires that denials be sworn. There is no similar requirement for responses or written objections:

**(c) Admission in the Absence of Denial.** Each of the matters of fact and the genuineness of each document of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either *(1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request.* A denial shall

fairly meet the substance of the requested admission. If good faith requires that a party deny only a part, or requires qualification, of a matter of which an admission is requested, the party shall specify so much of it as is true and deny only the remainder. Any objection to a request or to an answer shall be heard by the court upon prompt notice and motion of the party making the request. The response to the request, sworn statement of denial, or written objection, shall be served on all parties entitled to notice.

Ill. S. Ct. R. 216(c) (emphasis added). ComEd Init. Br. at 25-26.

The underlined portion of the Rule was added pursuant to amendment May 29, 2014, effective July 1, 2014. ComEd explained that every case that LAZ cites in support of its argument is prior to this clarifying amendment. LAZ Parking's Motion *In Limine* (March 4, 2016) at 5-7. See *also* Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto (Nov. 13, 2012); LAZ Parking's Reply in Support of its Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto (Jan. 11, 2013). ComEd Init. Br. at 26.

ComEd asserted that the Illinois Supreme Court has adopted the U.S. Supreme Court's statutory retroactivity test in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

Under the *Landgraf* test, if the legislature has clearly indicated what the temporal reach of an amended statute should be, then, absent a constitutional prohibition, that expression of legislative intent must be given effect. However, when the legislature has not indicated what the reach of a statute should be, then the court must determine whether applying the statute would have a retroactive impact, *i.e.*, "whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." [citation omitted] If there would be no retroactive impact, as that term is defined by the court, then the amended law may be applied.

\* \* \*

As examples of statutory changes that normally do not have a retroactive impact, the Court mentioned statutes that affect jurisdiction and statutes that affect certain procedural rules. *Landgraf*, 511 U.S. at 273–76, 114 S.Ct. at 1501-03, 128 L.Ed.2d at 257–59. The Court also observed: "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment [citation] or upsets expectations based in prior law."

*Commonwealth Edison Co. v. Will County Collector*, 749 N.E.2d 964, 971-72 (Ill. 2001). ComEd Init. Br. at 26.

ComEd contended that LAZ did not have a vested right, "*i.e.*, an interest protected from legislative interference by the due process clause of the Illinois Constitution," to a sworn response. *Will County*, 749 N.E.2d at 969. Moreover, even prior to *Landgraf*,

“[a]nother exception found in Illinois law” was “that a statutory amendment may be applied ‘retroactively’ where the legislature enacted the amendment merely to clarify an existing law that was ambiguous, rather than to change the law.” *People v. Ramsey*, 735 N.E.2d 533, 540 (Ill. 2000) (concurrence). The amendment here, as ComEd explained, simply clarifies the italicized portion of Rule 216(c) above, which indicates that only a denial must be sworn. ComEd stated that courts have inconsistently and in some cases improperly applied this portion of the Rule, as evidenced by LAZ’s citations. ComEd Init. Br. at 26-27.

ComEd stated that in addition, even if responses must be sworn, the case cited by LAZ in support of this proposition discusses the fact that in certain situations, responses to requests for admission may be certified by a party’s attorney. *In re Application of the County Treasurer and County Collector of Cook County, Illinois (Z Financial, LLC v. ALSJ, Inc.)*, 2012 IL App (1st) 112897, ¶¶ 33-35 (discussing dicta in prior case and limiting holding requiring the party as opposed to the attorney to certify the responses to the facts of the case at hand). ComEd Init. Br. at 27.

ComEd further stated that LAZ’s conclusion that ComEd was not permitted to “answer and object simultaneously to the same matter” (LAZ Parking’s Motion *In Limine* (March 4, 2016) at 5) is also not necessarily true. In *Favia v. Ford Motor Co.*, the First District affirmed denial of a motion to deem facts admitted where the defendant’s response contained both an objection and a statement that the party was unable to admit or deny. *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 821-22 (1st Dist. 2008). ComEd explained that even the case that LAZ relies on for this proposition states that only those portions of the co-mingled answers and objections that amounted to objections should have been discarded. *City of Chicago ex rel. Schs. v. Schorsch Realty Co.*, 95 Ill. App. 2d 264, 278 (1st Dist. 1968). As explained by ComEd, the court did not hold that both the answers *and* objections should have been thrown out, the draconian result that LAZ has achieved here. *Id.* ComEd Init. Br. at 27.

In reply, ComEd stated that LAZ argues that ComEd’s responses to its requests for admission “failed to comply with the most fundamental requirements of S. Ct. Rule 216” because ComEd’s objections and responses were not sworn. LAZ Init. Br. at 5. LAZ is incorrect. As explained in ComEd’s Initial Brief, the plain language of Rule 216 and its clarifying amendment indicate that only denials must be sworn. See ComEd Init. Br. at 25-27. Specifically, Rule 216 only uses the word “sworn” directly in front of the phrases “statement denying” or “statement of denial.” Ill. S. Ct. R. 216(c). It does not use the word “sworn” in front of the words “answer,” “response,” or “objection.” *Id.* ComEd Reply Br. at 13.

Moreover, ComEd argued that in addition to the canons of statutory interpretation discussed previously, “[t]he punctuation of a statute is to be considered and given weight unless, from inspection of the entire statute, it is clear it must be ignored to give effect to the legislature’s intent.” *Old Colony*, 364 Ill. App. 3d at 813. The amendment to Rule 216 separates the descriptions of the different ways to answer a Rule 216(c) request with commas, stating: “The response to the request, sworn statement of denial, or written

objection, shall be served on all parties entitled to notice.” Ill. S. Ct. R. 216(c). This amendment makes clear that there are three options in responding to a request for admission: a response, a denial, or an objection. *Id.* The amendment also makes clear that only a denial must be sworn. *Id.* If the legislature intended the word “sworn” to modify all three options, it would have used different word order and punctuation. ComEd Reply Br. at 13.

ComEd contended that LAZ has consistently addressed this issue as if there are only two options: a sworn denial or a sworn objection. LAZ Init. Br. at 5-6; ALJ Ruling (Feb. 13, 2014) at 4. As ComEd stated, the plain language of Rule 216 and its clarifying amendment show that this position is incorrect, and LAZ’s claim that this clarifying amendment does not impact this case is unavailing. ComEd argued that the Commission should disregard the “Admissions” in this case. ComEd Reply Br. at 13-14.

## **2. Admissions that Appear to be Untrue**

ComEd argued that although LAZ would have the ALJ believe that the Supreme Court rules are inflexible and must be harshly enforced, the very case that LAZ cites for this proposition also states that requests for admission are essentially discovery tools and “circuit courts must be allowed to exercise discretion over the conduct of pretrial discovery.” *Bright v. Dicke*, 652 N.E.2d 275, 276-77 (1995). And as discussed above, a judge may disregard an admission if it appears that facts in the admission are untrue. *Ellis v. Am. Family Mut. Ins. Co.*, 322 Ill. App. 3d 1006, 1010 (4th Dist. 2001); *New Amsterdam Cas. Co. v. Waller*, 323 F.2d 20, 24 (4th Cir. 1963). ComEd Init. Br. at 28.

ComEd stated that it has provided extensive testimony and documentary evidence detailing that the “Admissions” are untrue. For example, the amount claimed in LAZ’s “Admission” No. 6 is \$259,937.85. See Notice of ALJ’s Ruling (Feb. 13, 2014) at 5. But according to ComEd, that figure does not correspond to any of the amounts that ComEd’s evidence shows are related to the constant error. Moreover, it does not match the \$225,484.52 total value of the delivery service charges, it does not appear to account for the \$44,541.37 in credits for previously billed and paid delivery service charges, nor does it reconcile to the actual \$180,943.15 in unbilled delivery service charges after that credit is applied. *Id.* In short, ComEd argued, it has shown that number to be false in every respect. ComEd Init. Br. at 28.

As explained in ComEd’s Response to LAZ Parking’s Motion *In Limine*, the remaining “Admissions” regarding the dollar amount at issue are irrelevant, vague, and/or incomplete. See ComEd Response to LAZ Parking’s Motion *In Limine* (March 10, 2016) at 6-10. Briefly, ComEd explained, “Admission” No. 1 simply states the dollar value plainly referenced on the face of the Disconnection Notice. See Notice of ALJ’s Ruling (Feb. 13, 2014) at 5. “Admission” No. 2 states only that ComEd made a calculation, but does not state the result of that calculation. *Id.* “Admission” No. 3 states only that the amount in the Disconnection Notice was related to delivery service charges, without providing a date range. *Id.* ComEd Init. Br. at 28-29.

ComEd also explained that “Admission” No. 5 is a further example of the false – or at best misleading – nature of the “Admissions.” According to ComEd, the evidence shows that ComEd calculated the unbilled delivery service in May 2010. ComEd Ex. 3.0 at 6-7. ComEd did not issue bills directly to LAZ because LAZ elected to obtain its supply from MidAmerican Energy Company (“MidAmerican”) under the single-bill option, which means that LAZ received one monthly bill from MidAmerican containing both its energy supply and delivery service charges. ComEd Ex. 4.0 at 3-4; LAZ Ex. 1.0 at 4. ComEd stated that LAZ’s own exhibits show that MidAmerican sent LAZ billing documents in July 2010 containing dollar values related to those ComEd calculations. LAZ Exs. 1.2 and 1.3. ComEd Init. Br. at 29.

As explained by ComEd and as the excerpt below shows, on September 9, 2010, ComEd also directly informed LAZ of the facts surrounding the claim for unbilled services.

Date: September 9, 2010  
To: Laz Parking acct # 29310-08045  
From: Tom Williams  
Re: Billing Error

Mr. Gray

ComEd regrets to inform you that a billing error was discovered on meter number 141362866 in May of 2010 and on 5/18/2010 [sic] sent out the first bill reflecting this error. The problem started when ComEd exchanged the meter on 12/14/07. The new meter was put in with the wrong constant multiplier. To rectify this billing issue ComEd cancelled billing as far back as 6/10/2010 [sic] due to the 2 year debit rule (Illinois Commerce Commission allows ComEd to back bill for up to two years), so even though LAZ was billed wrong from 12/14/07 to 5/3/10, ComEd only corrected from 6/10/08 to the present. So from 12/14/07 to 6/10/08 LAZ was billed for very low usage. Also, if you check your records you will see that the meter usage was significantly higher prior to the meter exchange. Please note, billing options will be provided in the near future.

Sincerely,  
Tom Williams  
ComEd

ComEd Ex. 8.0 at CCLP 0000084. ComEd issued the unrelated Disconnection Notice eleven days later, on September 20, 2010. ComEd Init. Br. at 29-30.

ComEd explained that it again provided this September 9, 2010 letter to LAZ in discovery, on August 13, 2012. See ComEd’s Response to LAZ Parking’s First Set of Data Requests, labeled as LAZ 1.01 and its attachment LAZ 1.01\_Attach 1 (excerpt entered into the record as ComEd Ex. 8.0). Subsequently, on October 5, 2012, LAZ issued its First Set of Requests for Admission, containing Admission No. 5:

5. Prior to the date of the Disconnection Notice, ComEd had not notified LAZ Parking of the amount of any claim of ComEd for alleged unbilled service charges.

Notice of ALJ's Ruling (Feb. 13, 2014) at 5; Exhibit A to LAZ Parking's Motion *In Limine* (March 4, 2016). ComEd Init. Br. at 30.

ComEd asserted that there are several problems with this "Admission." First, prior to the date of the Disconnection Notice, ComEd had notified LAZ – through MidAmerican – of the amount of the unbilled delivery service charges. Second, prior to the date of the Disconnection Notice, ComEd had notified LAZ directly of the facts related to the unbilled delivery service charges. Third, the Disconnection Notice and the unbilled delivery service charges are not related – they are two separate issues that LAZ attempts to conflate in the "Admission." ComEd argued that this behavior by LAZ – calculated to obtain a misleading or false admission – is unseemly at best. ComEd Init. Br. at 30.

Lastly ComEd contended that the remainder of LAZ's "Admissions" suffer from similar flaws in veracity. *Compare* Admission Nos. 4 and 9 (stating ComEd programmed LAZ Meter with incorrect meter constant) and Admission Nos. 7, 8, 9, 10 (stating ComEd tested LAZ Meter on October 25, 2007 and April 6, 2010) *with* ComEd Ex. 1.0 at 8 and ComEd Ex. 3.0 at 4 (showing that ComEd utilizes meter constants in CIMS; ComEd does not program meter constants into meters) and ComEd Ex. 1.0 at 13-14 (showing that the manufacturer tested the LAZ meter and ComEd accepted those test results using its sample testing procedures; ComEd never tested the LAZ Meter). ComEd Init. Br. at 30-31.

### **3. Use of Requests for Admission in this Case**

ComEd argued that LAZ's use of requests for admission in this instance – not ComEd's discovery responses or testimonial evidence – is actually what is improper. ComEd further explained that the purpose of requests for admission is to streamline cases and make them more efficient by establishing uncontroverted facts ahead of time so that only the disputed issues can be clearly and succinctly presented. *In re County Treasurer (Z Financial, LLC v. ALSJ, Inc.)*, 2012 IL App (1st) 112897, ¶ 27. They are intended to be used "to expedite litigation, to obviate the difficulty and expense in procuring evidence, and to compel an admission by the adverse party of evidence which is generally of incontrovertible character. ... use of the procedure to request the admission of controverted facts should be avoided ... ." *People v. Mindham*, 253 Ill. App. 3d 792, 797-98 (2d Dist. 1993) (cited by LAZ for the proposition that requests to admit are binding; party in *Mindham* failed to answer requests at all). ComEd Init. Br. at 31.

Indeed as ComEd explained, the *Mindham* case that LAZ relies on quotes *People v. Strasbaugh*, 194 Ill. App. 3d 1012, 1017 (4th Dist. 1990), which states: "request to admit facts is designed to eliminate the need to prove facts which are not in dispute, and it is not appropriate for a party to prove her case by use of this procedure where ultimate facts are fairly disputed." Another Illinois appellate court similarly stated:

The purpose of Supreme Court Rule 216 is noted in the Historical and Practice Notes found under this rule, where it is stated: “But the request to admit should be used to obviate the necessity of proof of facts as to which there is no real dispute, such as delivery of a deed or ownership of property. Using it to blanket the case and to cover matters that are fairly disputed is a waste of the time of counsel for both sides and the court.”

*Sims v. City of Alton*, 172 Ill. App. 3d 694, 699 (5th Dist. 1988) (citation omitted). Here, ComEd argued, LAZ is attempting to do just that: to use requests for admission to establish controverted facts and prove its case. According to ComEd, this has certainly not streamlined the process or made it more efficient. ComEd Init. Br. at 31-32.

#### **4. Waiver of “Admissions”**

ComEd further argued that LAZ itself has placed several of the “Admissions” in contention, thereby waiving its use of those “Admissions.” *Compare* LAZ Ex. 1.0 at 6-8 and LAZ Exs. 1.2 through 1.5 (discussing billing dates, charges, and amounts, as well as Disconnection Notice and alleged lack of communication regarding billing error) *with* Notice of ALJ Ruling (Feb. 13, 2014) Admission Nos. 1, 2, 3, 5 and 6 (addressing same subjects). Where a party presents evidence concerning admissions, it waives those admissions. *Moy v. Ng*, 341 Ill. App. 3d 984, 991 (1st Dist. 2003) (cited by LAZ). ComEd Init. Br. at 32.

In summary, ComEd stated that its responses to LAZ’s requests for admission were not improper and should not have been discarded by the ALJ. ComEd asserted that the result is that LAZ has obtained “Admissions” that are patently false. According to ComEd, LAZ is undoubtedly aware of this and has even waived some of the “Admissions,” yet it continues to advocate for use of the “Admissions” *and* insists on wasting the Commission’s and the parties’ time and resources further litigating this issue. ComEd Init. Br. at 32.

## **VII. COMMISSION ANALYSIS AND CONCLUSIONS**

## **VIII. FINDINGS AND ORDERINGS PARAGRAPHS**

By order of the Commission this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

(SIGNED) BRIEN SHEAHAN

Chairman